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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE NINTH INSTALMENT OF "E3" CLAIMS

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Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the Panel"), composed of Messrs. John Tackaberry (Chairman), Pierre Genton and Vinayak Pradhan, at its twenty-eighth session in June 1998, to review construction and engineering claims filed with the Commission on behalf of corporations and other legal entities in accordance with the relevant Security Council resolutions, the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") and other Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning the claims of sixteen corporations included in the ninth instalment. Each of the claimants seeks compensation for loss, damage or injury allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait.

2. Each of the claimants had the opportunity to provide the Panel with information and documentation concerning their claims. The Panel has considered evidence from the claimants and the responses of Governments to the reports of the Executive Secretary issued pursuant to article 16 of the Rules. The Panel has retained consultants with expertise in valuation and in construction and engineering. The Panel has taken note of certain findings by other Panels of Commissioners, approved by the Governing Council, regarding the interpretation of relevant Security Council resolutions and Governing Council decisions. The Panel was mindful of its function to provide an element of due process in the review of claims filed with the Commission. Finally, the Panel has further amplified both procedural and substantive aspects of the process of formulating recommendations in its preamble to its consideration of the individual claims.

I. PROCEDURAL HISTORY

A. The nature and purpose of the proceedings

3. The status and functions of the Commission are set forth in the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991) dated 2 May 1991 (S/22559). In his report, the Secretary-General described the function of the Commission as follows:

> "The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved. Given the nature of the Commission, it is all the more important that some element of due process be built into the procedure. It will be the function of the commissioners to provide this element." (S/22559, paragraph 20).

"The processing of claims will entail the verification of claims and evaluation of losses and the resolution of any disputed claims. The major part of this task is not of a judicial nature; the resolution of disputed claims would, however, be quasi-judicial. It is envisaged that the processing of claims would be carried out principally by the commissioners. Before proceeding to the verification of claims and evaluation of losses, however, a determination will have to be made as to whether the losses for which claims are presented fall within the meaning of paragraph 16 of resolution 687 (1991), that is to say, whether the loss, damage or injury is direct and as a result of Iraq's unlawful invasion and occupation of Kuwait." (S/22559, paragraph 25).

4. The Panel is entrusted with three tasks in the present proceedings. First, the Panel is required to determine whether the various types of losses alleged by the claimants are within the jurisdiction of the Commission, i.e., whether the losses were caused directly by Iraq's invasion and occupation of Kuwait. Second, the Panel has to verify whether the alleged losses that are in principle compensable have in fact been incurred by a given claimant. Third, the Panel is required to determine whether these compensable losses were incurred in the amounts claimed, and if not, the appropriate quantum for the loss based on the evidence before the Panel.

5. In fulfilling these tasks, the Panel considered that the vast number of claims before the Commission and the time limits in the Rules necessitated the use of an approach which is itself unique, but the principal characteristics of which are rooted in generally accepted procedures for claim determination, both domestic and international. It involves the employment of well established general legal standards of proof and valuation methods that have much experience behind them. The resultant process is essentially documentary rather than oral, and inquisitorial rather than adversarial. This method carefully balances the twin objectives of speed and accuracy. It also permits the efficient resolution of the thousands of claims filed by corporations with the Commission.

B. The procedural history of the claims in the ninth instalment

6. The claims submitted to the Panel in this instalment and addressed in this report were selected by the secretariat of the Commission from among the construction and engineering claims (the "'E3' Claims") on the basis of established criteria. These include the date of filing and compliance by claimants with the requirements established for claims submitted by corporations and other legal entities (the "category 'E' claims").

7. On 4 February 1999, the Panel issued a procedural order relating to the claims. The Panel decided to complete its review of the claims within

180 days of the date of its procedural order, in accordance with article 38(c) of the Rules.

8. In view of the review period and the available information and documentation the Panel determined that it was able to evaluate the claims without additional information or documents from the Government of Iraq. Nonetheless, due process, the provision of which is the responsibility of the Panel, has been achieved by the insistence of the Panel on the observance by claimants of the article 35(3) requirement for sufficient documentary and other appropriate evidence.

9. Prior to presenting the ninth instalment to the Panel, the secretariat performed a preliminary assessment of each claim in order to determine whether the claim met the formal requirements established by the Governing Council in article 14 of the Rules. For those claims that did not meet the formal requirements, each claimant was notified of the deficiencies and invited to provide the necessary information.

10. Further, a review of the legal and evidentiary basis of each claim identified specific questions as to the evidentiary support for the alleged loss. It also highlighted areas of the claim in which further information and documentation was required. Consequently, questions and requests for additional documentation were transmitted to the claimants pursuant to the Rules. Upon receipt of the responses and additional documentation, a detailed factual and legal analysis of each claim was conducted.

11. That analysis brought to light the fact that many claimants lodged little material of a genuinely probative nature when they initially filed their claims. It also appears that many claimants did not retain clearly relevant documentation and were unable to provide it when asked for it. Indeed, some claimants have destroyed documents in the course of a normal administrative process without distinguishing between documents with no long term purpose and documents necessary to support the claims that claimants had already put forward. Finally, some claimants did not respond to requests for further information and evidence. The consequence has inevitably been that for a large number of loss elements the Panel has been unable to recommend any compensation. The Panel returns to this topic later.

12. The Panel performed a thorough and detailed factual and legal review of the claims. The Panel has assumed an investigative role that goes beyond reliance merely on information and argument supplied with the claims as presented. After a review of the relevant information and documentation, the Panel made initial determinations as to the compensability of the loss elements of each claim. Next, comprehensive reports on each of the claims were prepared focusing on the appropriate valuation of each of the compensable losses, and on the question of whether the evidence produced by the claimant was sufficient in accordance with article 35(3) of the Rules.

13. The valuation analysis ensures clarity and consistency in the application of certain valuation principles to the construction and engineering claims. Each loss element was individually analysed according to a set of instructions provided by the Panel. The cumulative effect was one of the following: (a) a recommendation of full compensation for the alleged loss; (b) an adjustment to the amount of the alleged loss; or (c) a recommendation of no compensation.

C. The claimants

14. This report contains the Panel's findings with respect to the following claims for losses allegedly caused directly by Iraq's invasion and occupation of Kuwait:

(a) Lescomplekt Ltd, a corporation organised under the laws of the Republic of Bulgaria, which seeks compensation in the total amount of US$1,042,868;

(b) Telecomplect AD, a corporation organised under the laws of the Republic of Bulgaria, which seeks compensation in the total amount of US$825,394;

(c) China Civil Engineering Construction Corporation, a state enterprise licensed in the People's Republic of China, which seeks compensation in the total amount of US$9,224,548;

(d) China Harbour Engineering Company, a state enterprise licensed in the People's Republic of China, which seeks compensation in the total amount of US$2,623,588;

(e) The General Company for Land Reclamation, a company organised under the laws of the Arab Republic of Egypt, which seeks compensation in the total amount of US$14,778,645;

(f) CIPEC, an entity organised under the laws of the French Republic, which seeks compensation in the total amount of US$79,359;

(g) Freyssinet International et Compagnie, a corporation organised under the laws of the French Republic, which seeks compensation in the total amount of US$3,334,131;

(h) Chemitherm Plants and Systems Pvt Ltd, a corporation organised under the laws of the Republic of India, which seeks compensation in the total amount of US$250,502;

(i) Murazumi Construction Co. Ltd, a corporation organised under the laws of Japan, which seeks compensation in the total amount of US$1,599,843;

(j) Corderoy International Limited, a corporation organised under the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of US$95,852;

(k) Costain International Limited, a corporation organised under the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of US$422,786;

(l) Ewbank Preece Limited, a corporation organised under the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of US$122,205;

(m) IMI Yorkshire Copper Tube (Exports) Limited, a corporation organised under the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of US$85,415;

(n) Kaskade Drains Limited, a corporation organised under the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of US$27,459;

(o) Pirelli General PLC, a public limited company organised under the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of US$5,503,338; and

(p) Lewis & Zimmerman Associates, Inc, a corporation organised under the laws of the United States of America, which seeks compensation in the total amount of US$38,886.

15. In drafting this report, the Panel has not included specific citations from restricted or non-public documents that were produced or made available to it for the completion of its work.

II. LEGAL FRAMEWORK

A. Applicable law

16. In paragraph 16 of resolution 687 (1991), the Security Council:

> "Reaffirms that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait".

17. The sources of the law and principles to be applied by the Panel are set out in article 31 of the Rules:

"In considering the claims, Commissioners will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law."

B. Liability of Iraq

18. When adopting resolution 687 (1991), the Security Council acted under chapter VII of the Charter of the United Nations which provides for maintenance or restoration of international peace and security. The Security Council also acted under chapter VII when adopting resolution 692 (1991), in which it decided to establish the Commission and the Compensation Fund referred to in paragraph 18 of resolution 687 (1991). Specifically, under resolution 687 (1991), the issue of Iraq's liability for losses falling within the Commission's jurisdiction is resolved and is not subject to review by the Panel.

19. In this context, it is necessary to address the meaning of the term "Iraq". In Governing Council decision 9 (S/AC.26/1992/9) and other Governing Council decisions, the word "Iraq' was used to mean the Government of Iraq, its political subdivisions, or any agency, ministry, instrumentality or entity (notably public sector enterprises) controlled by the Government of Iraq. In the Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "E3" Claims (the "Fifth Report", S/AC.26/1999/2), the Panel adopted the presumption that for contracts performed in Iraq, the other contracting party was an Iraqi Government entity. This presumption is also adopted for the claims reviewed in this report.

C. The "arising prior to" clause

20. The Panel recognizes that it is difficult to establish a fixed date for the exclusion of its jurisdiction that does not contain an arbitrary element. With respect to the interpretation of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), the Panel of Commissioners that reviewed the first instalment of "E2" claims concluded that the "arising prior to" clause was intended to exclude the foreign debt of Iraq which existed at the time of Iraq's invasion of Kuwait from the jurisdiction of the Commission. As a result, the "E2" Panel found that:

"In the case of contracts with Iraq, where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990, claims based on payments owed, in kind or in cash, for such performance are outside of the jurisdiction of the Commission as

claims for debts or obligations arising prior to 2 August 1990." (the "E2" Report, S/AC.26/1998/7, paragraph 90).

21. That report was approved by the Governing Council. Accordingly, this Panel adopts for the purpose of this report the early interpretation which is to the following effect:

(a) the phrase "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through normal mechanisms" was intended to have an exclusionary effect on the Commission's jurisdiction, i.e., such debts and obligations are not compensable by the Commission;

(b) the limitation contained in the clause "arising prior to 2 August 1990" was intended to leave unaffected the debts and obligations of Iraq which existed prior to Iraq's invasion and occupation of Kuwait; and

(c) the terms "debts" and "obligations" should be given the customary and usual meanings applied to them in ordinary discourse.

22. Thus, the Panel accepts that, in general, a claim relating to a "debt or obligation arising prior to 2 August 1990" means a debt and/or obligation that is based on work performed or services rendered prior to 2 May 1990.

D. Application of the "direct loss" requirement

23. Paragraph 21 of Governing Council decision 7 (S/AC.26/1991/7) is the seminal rule on "directness" for category "E" claims. It provides in relevant part that compensation is recoverable for:

"... any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:

(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

(b) Departure of persons from or their inability to leave Iraq or Kuwait (or a decision not to return) during that period;

(c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

(d) The breakdown of civil order in Kuwait or Iraq during that period; or

(e) Hostage-taking or other illegal detention."

24. The text of paragraph 21 of decision 7 is not exhaustive and leaves open the possibility that there may be causes of "direct loss" other than those enumerated. Paragraph 6 of decision 15 of the Governing Council (S/AC.26/1992/15) confirms that there "will be other situations where evidence can be produced showing claims are for direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait". Should that be the case, the claimants will have to prove specifically that a loss that was not suffered as a result of one of the five categories of events set out in paragraph 21 of decision 7 is nevertheless "direct". Paragraph 3 of decision 15 emphasizes that for any alleged loss or damage to be compensable, the "causal link must be direct". (See also paragraph 9 of decision 9).

25. While the phrase "as a result of" contained in paragraph 21 of decision 7 is not further clarified, Governing Council decision 9 provides guidance as to what may be considered "losses suffered as a result of" Iraq's invasion and occupation of Kuwait. It identifies the three main categories of loss types in the "E" claims: losses in connection with contracts, losses relating to tangible assets and losses relating to income-producing properties. Thus, decisions 7 and 9 provide specific guidance to the Panel as to how the "direct loss" requirement must be interpreted.

26. In the light of the decisions of the Governing Council identified above, the Panel has reached certain conclusions as to the meaning of "direct loss". These conclusions are set out in the following paragraphs.

27. With respect to physical assets in Iraq or in Kuwait as at 2 August 1990, a claimant can prove a direct loss by demonstrating two matters. First, that the breakdown in civil order in these countries, which resulted from Iraq's invasion and occupation of Kuwait, caused the claimant to evacuate its employees. Second, as set forth in paragraph 13 of decision 9, that the claimant left physical assets in Iraq or in Kuwait.

28. With respect to losses relating to contracts to which Iraq was a party, force majeure or similar legal principles are not available as a defense to the obligations of Iraq.

29. With respect to losses relating to contracts to which Iraq was not a party, a claimant may prove a direct loss if it can establish that Iraq's invasion and occupation of Kuwait or the breakdown in civil order in Iraq or Kuwait following Iraq's invasion caused the claimant to evacuate the personnel needed to perform the contract.

30. In the context of the losses set out above, reasonable costs which have been incurred to mitigate those losses are direct losses. The Panel bears in mind that the claimant was under a duty to mitigate any losses

that could have been reasonably avoided after the evacuation of its personnel from Iraq or Kuwait.

31. These findings regarding the meaning of "direct loss" are not intended to resolve every issue that may arise with respect to the Panel's interpretation of Governing Council decisions 7 and 9. Rather, these findings are intended as initial parameters for the review and evaluation of the claims in the present report.

E. Date of loss

32. There is no general principle with respect to the date of loss. It needs to be addressed on a case by case basis. In addition, the individual loss elements of each claim may give rise to different dates if analysed strictly. However, applying a different date to each loss element within a particular claim is impracticable as a matter of administration. Accordingly, the Panel has decided to determine a single date of loss for each claimant which in most cases coincides with the date of the collapse of the project.

F. Currency exchange rate

33. While many of the costs incurred by the claimants were denominated in currencies other than United States dollars, the Commission issues its awards in that currency. Therefore the Panel is required to determine the appropriate rate of exchange to apply to losses expressed in other currencies.

34. Several of the claimants have argued that their contracts contain currency exchange rates and, therefore, that these contractually agreed exchange rates should apply to all of their losses. The Panel agrees that, as a general rule, the exchange rate set forth in the contract is the appropriate rate for losses under the relevant contracts because this was specifically agreed by the parties.

35. For losses that are not contract based, however, the contract rate is not usually an appropriate rate of exchange. In the claims before the Panel, the valuation of tangible assets was not contemplated by the parties when agreeing to an exchange rate in the underlying contracts. In addition, these types of items are readily traded on the international markets. A rate of exchange determined by reference to such international trading appears to this Panel to be an appropriate one to apply to such claims. In this context, the United Nations Monthly Bulletin of Statistics has been the source of commercial exchange rates for all preceding Commission awards. Therefore, for non-contractual losses, the Panel finds the appropriate exchange rate to be the prevailing commercial rate, as evidenced by the United Nations Monthly Bulletin of Statistics, on the date of loss.

G. Interest

36. On the issue of the appropriate interest rate to be applied, the relevant Governing Council decision is decision 16 (S/AC.26/1992/16). According to that decision, "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award". In decision 16 the Governing Council further specified that "[i]nterest will be paid after the principal amount of awards", while postponing any decision on the methods of calculation and payment.

37. The Panel recommends that interest shall run from the date of loss.

H. Evidentiary requirements

38. Pursuant to article 35(3) of the Rules, corporate claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss. The Governing Council has stated in paragraph 5 of decision 15 that, with respect to business losses, there "will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order to justify a recommendation for compensation.

39. The Panel takes this opportunity to emphasize that what is required of a claimant by article 35(3) of the Rules is the presentation to the Commission and the Panel of evidence that must go to both causation and quantum. The Panel's interpretation of what is appropriate and sufficient evidence will vary according to the nature of the claim. That standard is also affected by the fact that, in the case of the claims which are the subject of this report, Iraq's input is limited to the participation defined by article 16 of the Rules. In implementing this approach, the Panel applied the relevant principles extracted from those within the corpus of principles referred to in article 31 of the Rules. The Panel returns to this important topic at paragraph 45 and following.

I. Claims preparation costs

40. Some claimants sought to recover compensation for the cost of preparing their claims. The compensability of claim preparation costs has not hitherto been ruled on and will be the subject, in due course, of a specific decision by the Governing Council. Accordingly, the Panel makes no recommendation with respect to costs of claim preparation in any of the claims where it is raised.

III. AMPLIFICATION OF THE REVIEW PROCESS: THE PROCEDURE

41. The Panel has now had the opportunity to review a considerable number of claims in the population of construction and engineering claims allocated to it. It has had the opportunity to analyse many of the issues

that are likely to arise in these construction cases; and has had the benefit of many decisions by other Panels. In the result, this is a convenient time and place for it to address two matters. First, it wishes to make some comments on the procedure involved in evaluating the claims put before it and of formulating recommendations for the consideration of the Governing Council. Second, and at a later stage, it will turn to some analyses of recurrent issues. The comments on procedure are for the purpose of bringing transparency to the decision making process of this Panel.

A. Consistency in Panel decisions

42. It may be that the Anglo-Saxon doctrine of precedent should not apply to the deliberations and recommendations of the Panels. Nonetheless, once a motivated recommendation of one panel is adopted by a decision of the Governing Council, it is something to which other panels must give great weight.

43. One may assume that there has been a claim upon which a Panel has already issued a recommendation supported by a full analysis. A subsequent claim is then presented to another Panel. As it happens, that subsequent claim manifests the same characteristics as the prior claim. In that event, the second Panel will follow the principle developed by the prior Panel. Of course, there may still be differences inherent in the two claims at the level of proof of causation or quantum. Nonetheless the principle will be the same.

44. Alternatively, that second claim will manifest different characteristics to the first claim. In that event, those different characteristics may give rise to a different issue of principle and thus warrant a different conclusion by the subsequent Panel to that of the previous Panel.

B. Evidence of loss

1. Sufficiency of evidence

45. At the end of the day, claims that are not supported by sufficient and appropriate evidence fail. And in the context of the construction claims that are before this Panel, the most important evidence is documentary. It is in this context that the Panel records that a syndrome which it found striking when it addressed the claims included in the Fifth Report has continued to manifest itself in the claims included in this report. This was the reluctance of claimants to make critical documentation available to the Panel.

46. Imperatively, the express wording of decision 46 of the Governing Council requires that "... claims received in categories "D", "E", and "F" must be supported by documentary and other appropriate evidence sufficient

to demonstrate the circumstances and amount of the claimed loss...". In this same decision, the Governing Council decided that "...no loss shall be compensated by the Commission solely on the basis of an explanatory statement provided by the claimant,...". (S/AC.26/1998/46)

47. The Panel notes that some of the claimants in this instalment sought to explain the lack of documentation by asserting that all the documentation was in areas of civil disorder and was destroyed, or, at least, cannot be accessed. Every single one of the claimants is or was based outside Iraq. The Panel is quite simply unprepared to believe that relevant duplicates of important documents, if not original records, were not kept at offices outside Iraq.

48. What is more, the absence of <u>any</u> relevant contemporary record to support a particular claim means that the claimant is inviting the Panel to make an award, often of millions of dollars, on no foundation other than the assertion of the claimant. This would not satisfy the "sufficient evidence" rule in article 35(3) of the Rules. It is something that the Panel is unable to do.

2. <u>Sufficiency under article 35(3): The obligation of disclosure</u>

49. Next in the context of the documentary evidence, this Panel wishes to highlight that claims must be supported by sufficient documentary and other appropriate evidence. This involves bringing to the attention of the Commission all material aspects of the claim, whether such aspects are seen by the claimant as beneficial to or reductive of its claims. The obligation is not dissimilar to good faith requirements under domestic jurisdictions.

3. <u>Missing documents: The nature and adequacy of the paper trail</u>

50. The Panel now turns to the question of what a claimant must do.

51. Where documents cannot be supplied, their absence must be explained in a credible manner. The explanation must itself be supported by the appropriate evidence. Claimants may also supply substitute documentation for or information about the missing documents. Claimants must remember that the mere fact that they suffered a loss at the same time as the hostilities in the Persian Gulf were starting or were in process does not mean that the loss was directly caused by Iraq's invasion and occupation of Kuwait. A causative link must be established. It should also be borne in mind that it was not the intention of the Security Council in its resolutions to provide a "new for old" basis of reimbursement of the losses suffered in respect of tangible property. Capital goods depreciate. That depreciation must be taken into account and demonstrated in the evidence filed with the Commission. In sum, in order for evidence to be considered appropriate and sufficient to demonstrate a loss, the Panel expects

claimants to present to the Commission a coherent, logical and sufficiently evidenced file leading to the financial claims that they are making.

52. Of course, the Panel recognises that in time of civil disturbances, the quality of proof may fall below that which would be submitted in a peace time situation. Persons who are fleeing for their lives do not stop to collect the audit records. Allowances have to be made for such vicissitudes. But the fact that offices on the ground in Kuwait, for example, were looted and/or destroyed would not explain why claimants have not produced documentary records that would reasonably be expected to be found at claimants' head offices situated in other countries.

53. The Panel has approached the claims in the light of the general and specific requirements to produce documents noted above. Where there has been a lack of documentation, combined with no or no adequate explanation for that lack, and an absence of alternative evidence to make good any part of that lack, the Panel has had no opportunity or basis upon which to make a recommendation.

C. Amending claims after filing

54. In the course of the administration of the claims after they have been filed with the Commission, further information is sought from the claimants pursuant to the Rules. When the claimants respond they sometimes seek to use the opportunity to amend their claims. They add new loss elements. They increase the amount originally sought in respect of a particular loss element. They transfer monies between or otherwise adjust the calculation of two or more loss elements. They do all of these.

55. The Panel notes that the period for filing category "E" claims expired on 1 January 1996. The Governing Council approved a mechanism for these claimants to file unsolicited supplements until 11 May 1998. A response, post 11 May 1998, to an inquiry for additional evidence is not an opportunity for a claimant to increase the quantum of a loss element or elements or to seek to recover in respect of new loss elements. In these circumstances, the Panel is unable to take into account such increases nor such new loss elements when it is formulating its recommendation to the Governing Council. It does, however, take into account additional documentation where that is relevant to the original claims, either in principle or in detail. It also exercises its inherent powers to re-characterise a loss which is properly submitted as to time, but is inappropriately allocated.

56. Some claimants also file unsolicited submissions. These too sometimes seek to increase the original claim in the ways indicated in the previous paragraph. Such submissions when received after 11 May 1998 fall to be treated in the same way as amendments put forward in solicited supplements. Accordingly the Panel is unable to, and does not, take into

account such amendments when it is formulating its recommendation to the Governing Council.

IV. AMPLIFICATION OF THE REVIEW PROCESS: RECURRENT SUBSTANTIVE ISSUES

57. As noted above, the Panel has now had the opportunity to review a considerable number of claims in the population of construction and engineering claims allocated to it. It has had the opportunity to analyse many of the issues that are likely to arise in these construction contracts; and has had the benefit of many decisions by other Panels. It has dealt above, in Part III, with the procedure involved in evaluating the claims put before it and of formulating recommendations for the consideration of the Governing Council. It now turns to some analyses of the recurrent substantive issues that arise in construction contracts.

58. Many issues arise more than once in the various claims that are included in this instalment. Rather than repeat the Panel's analysis seriatim each time such an issue arises, it is convenient to address the principle in a paragraph at an early stage of this report.

59. The purpose of this exercise is the provision of a template for the individual claims, with the aim of compressing the reports of this Panel. It also makes available an analysis of key issues in a convenient place and format.

60. Some of these principal issues have been addressed in the procedural history and legal framework above. Others are addressed in this section of the report.

A. Contract losses

1. Advance payments

61. Many construction contracts provide for an advance payment to be made by the employer to the contractor. These advance payments are often calculated as a percentage of the initial price (initial, because many such contracts provide for automatic and other adjustments of the price during the execution of the works). The purpose of the advance payment is to facilitate certain activities which the contractor will need to carry out in the early stages.

62. Mobilisation is often one such activity. Plant and equipment may need to be purchased. A workforce will have to be assembled and transported to the work site, where facilities will be needed to accommodate it. Another such activity is the ordering of substantial or important materials which are in short supply and may, therefore, be available only at a premium and/or at a long lead time.

63. Advance payments are usually secured by a bond provided by the contractor, and are usually paid upon the provision of the bond. They are frequently repaid over a period of time by way of deduction by the employer from the sums which are payable at regular intervals (often monthly) to the contractor for work done. See, in the context of payments which are recovered over a period of time, the observations about amortisation at paragraph 82, infra. Those observations apply mutatis mutandis to the repayment of advance payments.

64. The Panel notes that some claimants presenting claims have not clearly accounted for the amounts of money paid to them earlier by the Iraqi employer. This Panel regularly sees evidence of advance payments amounting to tens of millions of United States dollars. The Panel would expect these payments to be deductible from the claimed amounts for contract losses. It follows that where advance payments have been part of the contractual arrangements between the claimant and the employer, the claimant must account for these payments in reduction of its claims, unless these payments can be shown to have been recouped in whole or in part by the employer. Where no explanation or proof of repayment is forthcoming, the Panel has no option but to conclude that these amounts paid in advance are due, on a final accounting, to the employer, and must be deducted from the claimant's claim.

2. Losses arising as a result of unpaid retentions

65. The claims before this Panel include requests for compensation for what could be described as another form of deferred payment, namely unpaid retention.

66. Under many if not most construction contracts, provision is made for the regular payment to the contractor of sums of money during the performance of the work under the contract. The payments are often monthly, and often calculated by reference to the amount of work that the contractor has done since the last regular payment was calculated.

67. Where the payment is directly related to the work done, it is almost invariably the case that the amount of the actual (net) payment is less than the contractual value of the work done. This is because the employer retains in his own hands a percentage (usually 5 per cent or 10 per cent and with or without an upper limit) of that contractual value. (The same approach usually obtains as between the contractor and his subcontractors.) The retained amount is often called the "retention" or the "retention fund". It builds up over time. The less work the contractor had carried out before the project comes to an early halt, the smaller the fund.

68. The retention is usually payable in two stages, one at the commencement of the maintenance period, as it is often called, and the other at the end. The maintenance period usually begins when the employer first takes over the project, and commences to operate or use it. Thus the

work to which any particular sum which is part of the retention fund relates may have been executed a very long time before the retention fund is payable.

69. Retention fund provisions are very common in the construction world. The retention fund serves two roles. It is an encouragement to the contractor to make good defects appearing before or during the maintenance period. It also provides a fund out of which the employer can reimburse itself for defects that appear before or during the maintenance period which the contractor has, for whatever reason, failed or refused to make good.

70. In the claims before this Panel, events - in the shape of Iraq's invasion and occupation of Kuwait - have intervened. The contract has effectively come to an end. There is no further scope for the operation of the retention provisions. It follows that the contractor, through the actions of Iraq, has been deprived of the opportunity to recover the money. In consequence the claims for retention fall within the jurisdiction of the Commission.

71. In the light of the above considerations it seems to this Panel that the situation in the case of claims for retention is as follows:

(a) The evidence before the Commission may show that the project was in such trouble that it would never have reached a satisfactory conclusion. In such circumstances, there can be no positive recommendation, principally because there is no direct causative link between the loss and the invasion and occupation of Kuwait.

(b) Equally it may be the case that the evidence may show that the project would have reached a conclusion, but that there would have been problems to resolve. Accordingly the contractor would have had to expend money resolving those problems. That potential cost would have to be deducted from the claim for retention; and accordingly the most convenient course would be to recommend an award to the contractor of a suitable percentage.

(c) Finally, on the evidence it may be the case that there is no reason to believe or conclude that the project would have gone other than satisfactorily. In those circumstances, it seems that the retention claim should succeed.

3. Claims for contract losses with a Kuwaiti party

72. Some of the claims relate to losses suffered as a result of non-payment by a Kuwaiti or other entity. The fact of such a loss, simpliciter, does not establish it as a direct loss within the meaning of Security Council resolution 687 (1991). In order to obtain compensation, a claimant should lodge sufficient evidence that the Kuwaiti or other entity

carrying on business in Kuwait on 2 August 1990 was unable to make payment as a direct result of Iraq's invasion and occupation of Kuwait. A good example of this would be that the party was insolvent and that that insolvency was a direct result of the illegal invasion and occupation of Kuwait. At the very least a claimant should demonstrate that the Kuwaiti or other party had not renewed operations in Kuwait after the occupation. In the event that there are multiple factors which have resulted in the failure to resume operations, apart from the proved insolvency of the Kuwaiti or other party, the Panel will have to be satisfied that the effective reason or causa causans was Iraq's invasion and occupation of Kuwait. Any failure to pay because the Kuwaiti or other party was excused from performance by the operation of Kuwaiti law which came into force after Iraq's invasion and occupation of Kuwait is in the opinion of this Panel the result of a novus actus interveniens and it is not a direct loss arising out of Iraq's invasion and occupation of Kuwait.

B. Claims for overhead and "lost profits"

1. General

73. Any construction project can be broken down into a number of components. All of these components contribute to the pricing of the works. In the Panel's view, it is helpful for the examination of these kinds of claims to begin by rehearsing in general terms the way in which many contractors in different parts of the world construct the prices that ultimately appear in the construction contracts they sign. Of course, there is no absolute rule as to this process. Indeed, it is unlikely that any two contractors will assemble their bids in exactly the same way. But the constraints of construction work and the realities of the financial world impose a general outline from which there will rarely be a substantial deviation.

74. Many of the construction contracts encountered in this instalment contain a schedule of rates or a "bill of quantities". This document defines the amount to be paid to the contractor for the work performed. It is based on previously agreed rates or prices. The final contract price is the aggregate value of the work calculated at the quoted rates together with any variations and other contractual entitlements and deductions which increase or decrease the amount originally agreed.

75. Other contracts in this instalment are lump sum contracts. Here the schedule of rates or bill of quantities has a narrower role. It is limited to such matters as the calculation of the sums to be paid in interim certificates and the valuation of variations.

76. In preparing the schedule of rates, the contractor will plan to recover all of the direct and indirect costs of the project. On top of this will be an allowance for the "risk margin". In so far as there is an allowance for profit it will be part of the "risk margin". However,

whether or not a profit is made and, if made, in what amount, depends obviously on the incidence of risk actually incurred.

77. An examination of actual contracts combined with its own experience of these matters has provided the Panel with guidelines as to the typical breakdown of prices that may be anticipated on construction projects of the kind relevant to the claims included in this instalment.

78. The key starting point is the base cost - the cost of labour, materials and plant - the prix secs, as the French would have it. In another phrase, this is the direct cost. The direct cost may vary, but usually represents 65 to 75 per cent of the total contract price.

79. To this is added the indirect cost - for example the supply of design services for such matters as working drawings and temporary works by the contractor's head office. Typically, this indirect cost represents about 25 to 30 per cent of the total contract price.

80. Finally, there is what is called the "risk margin" - the allowance for the unexpected. The risk margin is generally in the range of between barely above zero and five per cent of the total contract price. The more smoothly the project goes, the less the margin will have to be expended. The result will be enhanced profits, properly so called, recovered by the contractor at the end of the day. The more the unexpected happens and the more the risk margin has to be expended, the smaller the profit will ultimately be. Indeed, the cost of dealing with the unexpected or the unplanned may equal or exceed the risk margin, leading to a nil result or a loss.

81. In the view of the Panel, it is against this background that some of the claims for contract losses need to be seen.

2. Head office and branch office expenses

82. These are generally regarded as part of the overhead. These costs can be dealt with in the price in a variety of ways. For example, they may be built into some or all of the prices against line items; they may be provided for in a lump sum; they may be dealt with in many other ways. One aspect, however, will be common to most, if not all, contracts. It will be the intention of the contractor to recover these costs through the price at some stage of the execution of the contract. Often the recovery has been spread through elements of the price, so as to result in repayment through a number of interim payments during the course of the contract. Where this has been done, it may be said that these costs have been amortised. This factor is relevant to the question of double counting (see paragraph 85 infra).

83. If therefore any part of the price of the works has been paid, it is likely that some part of these expenses has been recovered. Indeed, if

these costs have been built into items which are paid early, a substantial part or even all of these costs may have been recovered.

84. If these items were the subject of an advance payment, again they may have been recovered in their entirety at an early stage of the project. Here of course there is an additional complication, since the advance payments will be credited back to the employer - see paragraph 63, supra - during the course of the work. In this event, the Panel is thrown back onto the question of where in the contractor's prices payment for these items was intended to be.

85. In all these situations, it is necessary to avoid double-counting. By this the Panel means the situation where the contractor is specifically claiming, as a separate item, elements of overhead which, in whole or in part, are also covered by the payments made or claims raised for work done.

86. The same applies where there are physical losses at a branch or indeed a site office or camp. These losses are claimable, if claimable at all, as loss of tangible assets.

3. Loss of profits on a particular project

87. Governing Council decision 9, paragraph 9, provides that where "continuation of the contract became impossible for the other party as a result of Iraq's invasion and occupation of Kuwait, Iraq is liable for any direct loss the other party suffered as a result, including lost profits".

88. As will be seen from the observations at paragraphs 73 to 81, supra, the expression "lost profits" is an encapsulation of quite a complicated concept. In particular, it will be appreciated that achieving profits or suffering a loss is a function of the risk margin and the actual event.

89. The qualification of "margin" by "risk" is an important one in the context of construction contracts. These contracts run for a considerable period of time; they often take place in remote areas or in countries where the environment is hostile in one way or another; and of course they are subject to political problems in a variety of places - where the work is done; where materials, equipment or labour have to be procured; and along supply routes. The surrounding circumstances are thus very different and generally more risk prone than is the case in the context of, say, a contract for the sale of goods.

90. In the view of the Panel it is important to have these considerations in mind when reviewing a claim for lost profits on a major construction project. In effect one must review the particular project for what might be called its "loss possibility". The contractor will have assumed risks. It will have provided a margin to cover these risks. He will have to demonstrate a substantial likelihood that the risks would not occur or

would be overcome within the risk element so as to leave a margin for actual profit.

91. This approach, in the view of the Panel, is inherent in the thinking behind paragraph 5 of Governing Council decision 15. This paragraph expressly states that a claimant seeking compensation for business losses such as loss of profits, must provide "detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order for compensation to be awarded.

92. In the light of the above analysis, and in conformity with the two decisions cited above, this Panel requires the following from those construction claimants that seek to recover for lost profits. First, the phrase "continuation of the contract" imposes a requirement on the claimant to prove that it had an existing contractual relationship at the time of the invasion. Second, the provision requires the claimant to prove that the continuation of the relationship was rendered impossible by Iraq's invasion and occupation of Kuwait. This provision indicates a further requirement that profits should be measured over the life of the contract. It is not sufficient to prove that there would have been a "profit" at some stage before the completion of the project. Such a proof would only amount to a demonstration of a temporary credit balance. This can even be achieved in the early stages of a contract, for example where the pricing has been "front-loaded" for the express purpose of financing the project. Instead, the claimant must lodge sufficient and appropriate evidence to show that the contract would have been profitable as a whole.

4. Loss of profits for future projects

93. Some claimants say they would have earned profits on future projects, not let at the time of Iraq's invasion and occupation of Kuwait. Such claims are of course subject to the sorts of considerations set out by the Panel in its review of claims for lost profits on individual projects. In addition, it is necessary for such a claimant to overcome the problem of remoteness. How can a claimant be certain that it would have won the opportunity to carry out the projects in question? If there was to be competitive tendering, the problem is all the harder. If there was not to be competitive tendering, what is the basis of the assertion that the contract would have come to the claimant?

94. Accordingly, in the view of the Panel, for such a claim to warrant a recommendation, it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e., profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded. Among other matters, it will be necessary to establish a picture of the assets that were being employed so that the extent to which those assets would continue to be productive in the future can be determined. Balance sheets for previous years will have to be produced, along with

relevant strategy statements or like documents which were in fact utilised in the past. The current strategy statement will also have to be provided. In all cases, the Panel will be looking for contemporaneous documents rather than ones that have been formulated for the purpose of the claim; although the latter may have a useful explanatory or demonstrational role.

95. Such evidence is often difficult to obtain; and accordingly in construction cases such claims will only rarely be successful. And even where there is such evidence, the Panel is likely to be unwilling to extend the projected profitability too far into the future. The political exigencies of work in a troubled part of the world are too great to justify looking many years ahead.

C. Loss of monies left in Iraq: Funds in bank accounts

96. Some claimants sought to recover compensation for funds on deposit in Iraqi banks. Such funds were of course in Iraqi Dinars and were subject to exchange controls.

97. The first problem with these claims is that it is often not clear that there will be no opportunity in the future for the claimant to have access to and to use such funds. Indeed, many claimants, in their responses to interrogatories or otherwise have modified their original claims to remove such elements, as a result of obtaining access to such funds after the initial filing of their claim with the Commission.

98. Second, for such a claim to succeed it would be necessary to establish that in the particular case, Iraq would have permitted the exchange of such funds into hard currency for the purposes of export. For this, appropriate evidence of an obligation to this effect on the part of Iraq is required. Furthermore, the Panel notes that the decision to deposit funds in banks located in particular countries is a commercial decision, which a corporation engaged in international operations is required to make. In making this decision, a corporation would normally take into account the relevant country or regional risks involved.

99. In the claims the subject of this instalment, the Panel finds that the causal link in respect of this loss item is not direct. Consequently, the Panel has concluded that the claim for loss of use in this regard is speculative and not compensable by this Commission.

100. Turning from the particular to the general, the Panel, in analysing these claims has come to the conclusion that, in most cases, it will be necessary for a claimant to demonstrate (in addition to such matters as loss and quantum) that:

(a) the relevant Iraqi entity was under a contractual or other specific duty to exchange those funds for convertible currencies;

(b) Iraq would have permitted the transfer of the converted funds out of Iraq; and

(c) this exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

101. Absent proof of these aspects of the matter, it is difficult to see how the claimant can be said to have suffered any "loss". In such circumstances, the Panel will have been unable to recommend compensation.

D. Tangible property

102. With reference to losses of tangible property located in Iraq, decision 9 provides that where direct losses were suffered as a result of Iraq's invasion and occupation of Kuwait with respect to tangible assets, Iraq is liable for compensation (paragraph 12). Typical actions of this kind would have been the expropriation, removal, theft or destruction of particular items of property by Iraqi authorities. Whether the taking of property was lawful or not is not relevant for Iraq's liability if it did not provide for compensation. It furthermore provides that in a case where business property had been lost because it had been left unguarded by company personnel departing due to the situation in Iraq and Kuwait, such loss may be considered as resulting directly from Iraq's invasion and occupation (paragraph 13).

103. Many of the construction claims that come before this Panel are for assets that were confiscated by the Iraqi authorities in 1992 or 1993. Here the problem is one of causation. By the time of the event, the invasion and occupation of Kuwait was over. Liberation was a year or more earlier. Numerous of the claimants had managed to obtain access to their sites to establish the position that obtained at that stage. In the cases the subject of this paragraph, the assets still existed. However, that initially satisfactory position was then overtaken by a general confiscation of assets by Iraqi authorities. While it sometimes seems to have been the case that this confiscation was triggered by an event which could be directly related to Iraq's invasion and occupation of Kuwait, in the vast majority of the cases that the Panel has seen, this was not the case. It was simply the result of a decision on the part of the authorities to take over these assets. The Panel has difficulty in seeing how these losses were caused by Iraq's invasion and occupation of Kuwait. On the contrary, it appears that they stem from an wholly independent event and accordingly are outside the jurisdiction of the Commission.

E. Payment or relief to others

104. Paragraph 21(b) of decision 7 specifically provides that losses suffered as a result of "the departure of persons from or their inability to leave Iraq or Kuwait" are to be considered the direct result of Iraq's invasion and occupation of Kuwait. Consistent with decision 7, therefore,

the Panel finds that evacuation and relief costs incurred in assisting employees in departing from Iraq are compensable to the extent proven.

105. Paragraph 22 of Governing Council decision 7 provides that "payments are available to reimburse payments made or relief provided by corporations or other entities to others - for example, to employees, or to others pursuant to contractual obligations - for losses covered by any of the criteria adopted by the Council".

106. The "E2" Panel has found this to mean that where a claimant has proven that a payment was made, as a form of relief or otherwise, in connection with one of the acts or consequences described in paragraph 21 of decision 7, then such a payment is compensable by the Commission.

107. The "E3" Panel found that the costs associated with evacuating and repatriating employees from Iraq between 2 August 1990 and 2 March 1991 are compensable to the extent that the costs are proven by the claimant. Compensable costs consist of "temporary and extraordinary expenses" related to the repatriation, including items such as transportation costs, lodging and food while in transit.

108. Accordingly, this Panel finds that the costs associated with evacuating and repatriating employees between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proven by the claimant and are reasonable in the circumstances. Urgent temporary liabilities and extraordinary expenses relating to evacuation and repatriation, including transportation, food and accommodation, are in principle, compensable.

109. Many claimants did not provide a documentary trail detailing to perfection the expenses incurred in caring for their personnel and transporting them out of a theatre of hostilities.

110. In these cases the Panel considered it appropriate to accept a level of documentation consistent with the practical realities of a difficult, uncertain and often hurried situation, taking into account the concerns necessarily involved. The loss sustained by claimants in these situations is the very essence of the direct loss suffered which is stipulated by Security Council resolution 687 (1991). Accordingly, the Panel used its best judgement, after considering all relevant reports and the material at its disposal, to arrive at an appropriate figure.

111. The importance of recognising the laudable concerns of companies fulfilling their responsibilities of assisting their staff out of an hostile environment can never be overemphasised.

V. THE CLAIM OF LESCOMPLEKT LTD

112. Lescomplekt Ltd ("Lescomplekt") is a Bulgarian state-owned company. Its main activities are the study, design and maintenance of parks and green areas in urban and rural environments. Lescomplekt entered into a joint venture agreement on 4 June 1987 with a Kuwaiti company, Al Jahra Agricultural Products Equipments and Supplies Company ("Al Jahra") to "develop and execute landscape projects" for the Kuwaiti Public Authority for Agricultural and Fish Resources ("PAAF"). The share holding of the joint venture was Lescomplekt 49 percent and Al Jahra 51 percent. In October 1989 the joint venture won a contract with PAAF for the landscaping and maintenance of parks in downtown Kuwait ("the PAAF contract").

113. The joint venture was performing the PAAF contract when Iraq invaded Kuwait. Lescomplekt seeks compensation in the amount of US$1,042,868 for unpaid contractual amounts from PAAF, unpaid contractual amounts from Al Jahra and other individuals and companies in Kuwait, loss of profits, loss of tangible property, evacuation of personnel, salary payments, and repairs to motor vehicles.

A. Contract losses

1. Facts and contentions

114. Lescomplekt seeks compensation in the amount of KWD121,611 for contract losses in respect of agreements with PAAF, Al Jahra, and various other Kuwaiti individuals and companies.

115. In its claim form, Lescomplekt had characterised the losses incurred in relation to Al Jahra and the various Kuwaiti individuals and companies as losses relating to "business transaction or course of dealing", but the Panel finds that they are more accurately described as contract losses.

(a) Contract with PAAF

116. Lescomplekt asserts that PAAF owes it six separate amounts. The first amounts are of KWD17,489 and KWD13,530, which Lescomplekt asserts were owing on Interim Payment Certificates Number 7 and Number 8 respectively. Lescomplekt asserts that it had completed the work relating to both certificates, but the amounts were not paid by PAAF because of Iraq's invasion and occupation of Kuwait.

117. The third and fourth amounts relate to retention monies which Lescomplekt asserts PAAF was due to release at the same time that it was due to pay the certificates. The amount of KWD16,585 is in respect of monies retained for good performance of the contract. The amount of KWD8,293 is in respect of monies retained for tax clearance.

118. The fifth amount of KWD9,285 and the sixth amount of KWD5,400 relate to the hiring of two water tank trucks. Lescomplekt asserts that it was forced to hire additional water tank trucks in order to perform the PAAF contract because public repair works had disrupted the public water supply. It claims that PAAF was liable for these additional costs, and did not pay them because of Iraq's invasion and occupation of Kuwait.

(b) Contract with Al Jahra

119. Lescomplekt asserts that its joint venture partner owes it three separate amounts. The first amount concerns an advance payment made from Lescomplekt to Al Jahra for the purpose of enabling Al Jahra to pay for the labour required to perform the PAAF contract. Lescomplekt asserts that Al Jahra was liable to repay this advance on a monthly basis, and that KWD30,361 remains outstanding. It seeks compensation in this amount.

120. The second amount is a deposit of KWD1,000 paid by Lescomplekt to Al Jahra for the purpose of securing the installation of a telephone line. Lescomplekt states that the telephone line was never installed and seeks compensation in the amount of KWD1,000.

121. The third amount is an amount which Lescomplekt states that Al Jahra was liable to transfer from an affiliated enterprise to the joint venture. Leskomplekt states that Al Jahra never effected the transfer and seeks compensation in the amount of KWD7,494.

(c) Contracts with individuals and companies

122. Lescomplekt seeks compensation in the total amount of KWD12,175 for unpaid amounts from other individuals and companies. The claims arise out of mulch sold (KWD2,900), the sale of a truck (KWD6,900) and landscape work it undertook (KWD2,375), for which it was not paid.

2. Analysis and valuation

(a) Contract with PAAF

123. The Panel finds that Lescomplekt has submitted sufficient evidence to demonstrate that the joint venture entered into the contract with PAAF, and that the amounts on certificates 7 and 8, and the retention monies, were due and owing from PAAF.

124. However, the Panel finds that Lescomplekt has not demonstrated that PAAF's continued failure to pay these amounts is the direct result of Iraq's invasion and occupation of Kuwait. It has provided no evidence that PAAF was rendered insolvent or ceased to exist as a result of Iraq's invasion and occupation of Kuwait.

125. In respect of the claims for the hiring of the two water tank trucks, Lescomplekt submitted no evidence that PAAF agreed to the hiring of the water tank trucks or that it accepted liability for the claimed amounts.

126. The Panel recommends no compensation for the six amounts which Lescomplekt claims it was owed by PAAF.

(b) Contract with Al Jahra

127. The Panel finds that Lescomplekt has not provided sufficient evidence to demonstrate that the three amounts allegedly owed by Al Jahra were in fact owed.

128. The Panel notes that Al Jahra was neither in liquidation nor rendered insolvent by Iraq's invasion and occupation of Kuwait. It has lodged its own claim with the Commission. Accordingly, the Panel finds that even if Lescomplekt had demonstrated that Al Jahra owed the three amounts, the loss of the amounts would not have been directly caused by Iraq's invasion and occupation of Kuwait but by the decision of Al Jahra not to pay the amounts.

129. The Panel recommends no compensation in respect of the three amounts which Lescomplekt asserts it was owed by Al Jahra.

(c) Contracts with individuals and companies

130. The Panel finds that Lescomplekt has not provided sufficient evidence that it was owed the amounts claimed from the other unrelated individuals and companies. The Panel recommends no compensation in respect of these amounts.

3. Recommendation for contract losses

131. The Panel recommends no compensation for contract losses.

B. Loss of profits

132. Lescomplekt seeks compensation in the amount of KWD45,625 for loss of profits relating to the PAAF contract.

133. Applying the approach taken with respect to loss of profits on a particular project set out in paragraphs 87 to 92, the Panel recommends no compensation.

C. Loss of tangible property

134. Lescomplekt asserts that on 2 August 1990, its site offices in the Rawda area of Kuwait were invaded and occupied by Iraqi troops, and its staff driven away. Lescomplekt asserts that the offices were robbed, the

office equipment looted, and vehicles parked in the vicinity of the site offices commandeered. It seeks compensation in the amount of KWD128,010 for the loss of the following items of property: (a) site office and furniture; (b) two tipper trucks; (c) two water tank trucks; (d) minibus; (e) agricultural machinery; (f) drip irrigation system; (g) pump station; (h) villa and flat furnishing; (i) guard room furniture; (j) workshop facilities; (k) plants and materials in stock; and (l) plants in the joint nursery.

135. Lescomplekt provided some evidence relating to the purchase of the items of tangible property, and where relevant, the import of the items into Kuwait. The type of documents submitted included contracts of sale, copies of cheques, invoices and shipping documents.

136. The Panel finds that the evidence provided by Lescomplekt does not adequately support its claim. For example, with respect to (a) site office and furniture, the claim is for KWD15,200, yet the sale agreements and invoices provided by Lescomplekt evidence a total price for office and furniture of far less than this amount.

137. With respect to the claim for (e) agricultural machinery, Lescomplekt submitted the sales invoices, but not the schedules to the invoices (referred to in the invoices). The Panel finds it impossible to establish whether the equipment shipped matches the equipment which Lescomplekt asserts was destroyed. The Panel makes the same comment in respect of the claim for (h) the villa and flat furnishing.

138. Although Lescomplekt has provided some evidence concerning the purchase of the various items of tangible property, Lescomplekt has provided insufficient evidence to demonstrate that the items were in Kuwait at the time of the invasion by Iraq, or owned by Lescomplekt at that time.

139. Lescomplekt submitted no evidence of the age of any of the items of tangible property, nor the valuation methodology adopted, despite this information being requested.

140. The Panel recommends no compensation for loss of tangible property.

D. Payment or relief to others

141. Lescomplekt seeks compensation in the amount of KWD5,166 for costs incurred in respect of (a) air tickets for 11 employees evacuated from Amman to Sofia (KWD1,045); (b) "extra salary as relief payment" which Lescomplekt claims it paid the 11 evacuees (KWD886); and (c) salary which Lescomplekt asserts it continued to pay to three of its employees who were held hostage by Iraq (KWD3,235).

142. The Panel finds that Lescomplekt has submitted sufficient evidence that it incurred the cost of 11 air tickets for the evacuation of its

employees. However, Lescomplekt indicated that the cost of the 11 airfares did not exceed the cost which it would have incurred in repatriating its employees after natural completion of the PAAF contract. The Panel therefore recommends no compensation for the cost of 11 airfares.

143. The Panel finds that Lescomplekt has submitted sufficient evidence that it incurred the losses relating to the extra salary and the hostages' salary. It provided copies of orders from Lescomplekt to the Bulgarian National Bank for payment of both of the amounts claimed. The claims are also supported by excerpts from Lescomplekt's September 1990 and January 1991 pay-sheets.

144. The Panel recommends compensation in the amount of KWD886 for extra salaries, and in the amount of KWD3,235 for the salaries of its three staff members who were held hostage.

145. The Panel recommends compensation in the amount of KWD4,121 (US$14,260) for payment or relief to others.

E. Mitigation expenses

146. Lescomplekt seeks compensation in the amount of KWD977 for the cost of repairing three motor vehicles.

147. The Panel finds that Lescomplekt has not provided sufficient evidence to substantiate its claim. It has provided no evidence of ownership of the three vehicles. Further, whereas Lescomplekt in its statement of claim described the three vehicles as "found badly damaged after occupation", the Panel notes that another document describes one vehicle as "in decent technical condition", another as "in good condition", and only the third as "without engine, number plates, radio-cassette and many other parts missing". The only evidence of the repairs are shipping invoices which record "autoservice" of the three vehicles and the supply of spare parts. Lescomplekt has provided no evidence that it paid for the repairs.

148. The Panel recommends no compensation for mitigation expenses.

F. Summary of recommended compensation for Lescomplekt

149. Based on its findings regarding Lescomplekt's claim, the Panel recommends compensation in the amount of US$14,260. The Panel finds the date of loss to be 2 August 1990.

VI. THE CLAIM OF TELECOMPLECT AD

150. Telecomplect AD ("Telecomplect") is a Bulgarian state-owned enterprise. At the time of Iraq's invasion and occupation of Kuwait it was working on a number of major projects for the Kuwaiti Ministry of Communications. It seeks compensation in the amount of US$825,394 for contract losses, loss of tangible property, payment or relief to others, financial losses, mitigation expenses, claim preparation costs and interest.

A. Contract losses

1. Facts and contentions

151. Telecomplect seeks compensation in the amount of (a) KWD3,404 for extraordinary expenses paid in relation to imported goods which were not delivered; and (b) KWD1,279 for advance payments made for goods not delivered.

152. In relation to loss element (a), Telecomplect asserts that it entered into a contract with Sohryu Sangyo Co. Ltd ("Sohryu") for the delivery of construction materials to Kuwait. Telecomplect made an advance payment to Sohryu. Sohryu air freighted the materials from Japan to Bangkok, but due to Iraq's invasion and occupation of Kuwait, the goods could not be shipped from Bangkok to Kuwait. Sohryu stored the goods in Bangkok, subsequently returned them to Japan, sold them at a reduced price, and deducted the extraordinary expenses relating to storage, transport and losses upon disposal of the goods from the advance payment made by Telecomplect. Telecomplect claims the extraordinary expenses as its loss.

153. In relation to loss element (b), Telecomplect asserts that it had a contract with a local Kuwaiti company, Bader Khorafi Plastic Industries ("Bader") for the manufacture and delivery of pipes and fittings for Telecomplect's projects. Telecomplect asserts that it made several advance payments to the supplier for materials, and at the time of Iraq's invasion and occupation of Kuwait, had undelivered material due in the amount of KWD1,279.

2. Analysis and valuation

154. The Panel finds that Telecomplect's loss in relation to the extraordinary expenses was directly caused by Iraq's invasion and occupation of Kuwait, and that Telecomplect has provided sufficient evidence that it incurred the loss. The Panel recommends compensation in the amount of KWD3,404 (US$11,779) for the extraordinary expenses incurred by Telecomplect.

155. The Panel finds that the loss of the advance payments was not directly caused by Iraq's invasion and occupation of Kuwait. As evidenced

by a letter dated 16 December 1998 from Bader to the Commission, Bader was neither in liquidation nor rendered insolvent by Iraq's invasion and occupation of Kuwait, but is still in existence. The direct cause of Telecomplect's loss of the advance payments is the refusal of Bader to deliver the outstanding materials or to refund the advance payments. The Panel recommends no compensation for this loss element.

3. Recommendation for contract losses

156. The Panel recommends compensation in the amount of KWD3,404 (US$11,779) for contract losses.

B. Loss of tangible property

1. Facts and contentions

157. Telecomplect seeks compensation in the amount of KWD100,230 for loss of: (a) seven business vehicles (and the repair of an eighth vehicle) (KWD20,870); (b) 16 items of office furniture, fixtures and equipment (KWD3,274); (c) 17 items of machinery and tools (KWD15,061); and (d) inventory (materials, spare parts and foodstuffs) (KWD61,025).

158. Telecomplect provided audited reports for 1 August 1990 to 31 December 1991 which indicate that Telecomplect "disposed" of assets of the description for which it claims.

2. Analysis and valuation

(a) Business vehicles

159. The Panel finds that Telecomplect has provided sufficient evidence to prove the loss of the seven business vehicles. The Panel finds that the value of the seven vehicles was KWD13,147.

160. The Panel finds that Telecomplect has provided sufficient evidence to prove a loss of KWD1,170 in relation to repair of the eighth vehicle.

161. The Panel recommends compensation in the amount of KWD14,317 (US$49,540) for loss of business vehicles.

(b) Office furniture, fixtures and equipment

162. The Panel finds that Telecomplect has provided sufficient evidence to prove the loss of office furniture, fixtures and equipment to the value of KWD2,765.

163. The Panel recommends compensation in the amount of KWD2,765 (US$9,567) for loss of office furniture, fixtures and equipment.

(c) Machinery and tools

164. The Panel finds that Telecomplect has not provided sufficient evidence to prove the loss of machinery and tools. It provided purchase invoices in respect of only six of the 17 items of machinery and tools constituting its claim. Its audited accounts for 1 August 1990 to 31 December 1991 show that machinery and tools to the value of only KWD7,865 was disposed of, whereas the claim is for KWD15,061. The Panel is unable to determine from the evidence provided precisely what machinery and tools were lost or damaged directly due to Iraq's invasion and occupation of Kuwait.

165. The Panel recommends no compensation for loss of machinery and tools.

(d) Inventory (materials, spare parts and foodstuffs)

166. The Panel finds that Telecomplect has not provided sufficient evidence to prove the loss of materials. It provided invoices for only 69 lines of stock, out of the 163 lines constituting the claim. In many instances the invoices do not correlate exactly with the item claimed, but are close equivalents. The bulk of the items constituting the claim were purchased in June to August 1989, almost a year prior to the invasion. The audited accounts support the assertion that stock losses were suffered, but the Panel is unable to determine precisely what materials were lost or damaged directly due to Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for loss of materials.

167. The Panel finds that Telecomplect has not provided sufficient evidence to prove the loss of spare parts and foodstuffs as a direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for these items.

3. Recommendation for loss of tangible property

168. The Panel recommends compensation in the amount of KWD17,082 (US$59,107) for loss of tangible property.

C. Payment or relief to others

1. Facts and contentions

169. Telecomplect seeks compensation in the amount of KWD67,010 for (a) the salaries of 35 Bulgarian specialists which it asserts it continued to pay until their return to Baghdad (KWD46,537 for salaries; KWD13,961 for "social insurance"); (b) the salaries of seven local employees which it dismissed a few days after the invasion, but continued to pay for these several days (KWD811); (c) the cost of evacuating employees from Kuwait to Bulgaria (KWD210 for food; KWD680 for airfares); (d) the expenses of three employees using their own vehicles to travel from Kuwait to Bulgaria,

valued by Telecomplect at 50 percent of the cost of the airfare from Sofia to Kuwait (KWD385); and (e) the expenses of six employees detained in Baghdad (KWD4,425).

2. Analysis and valuation

(a) Salaries of 35 Bulgarian specialists

170. The Panel finds that Telecomplect has provided sufficient evidence to demonstrate that it employed the 35 Bulgarian specialists and that it paid them the salaries claimed. The Panel recommends compensation in the amount of KWD46,537 (US$161,028) for salaries.

171. Telecomplect provided no evidence to substantiate the social insurance cost, merely asserting that social insurance was 30 percent of the salaries paid. The Panel recommends no compensation for social insurance costs.

(b) Salaries of seven local employees

172. Telecomplect provided no evidence in support of this claim. It provided only a schedule prepared by itself listing the details of the seven employees. The Panel recommends no compensation for salaries paid to local employees.

(c) Evacuation of employees from Kuwait to Bulgaria

173. The Panel finds that Telecomplect has provided sufficient evidence to prove that it incurred the cost of KWD210 in food expenses for the 25 evacuees. The Panel recommends compensation in the amount of KWD210 (US$727) for food expenses of the employees.

174. The Panel finds that Telecomplect has provided sufficient evidence that it incurred the cost of KWD680 in air fares for the 25 evacuees. It provided two payment orders from Telecomplect to the Bulgarian Trade Bank for the amounts of US$1,000 and KWD387 respectively.

175. However, Telecomplect indicated that the cost of the 25 airfares did not exceed the cost which it would have incurred in repatriating its employees after natural completion of its contracts. The Panel therefore recommends no compensation for the airfares.

(d) Evacuation expenses of three employees using their own vehicles

176. The Panel finds that Telecomplect has provided sufficient evidence that the employees using their own vehicles to travel from Kuwait to Bulgaria were entitled to reimbursement by Telecomplect of 50 percent of the cost of train/air travel to Bulgaria. Telecomplect provided a document

entitled "Regulations concerning work conditions of Bulgarians working abroad" to this effect.

177. However, the Panel finds that Telecomplect would have incurred this cost in any event upon natural completion of its contracts in Kuwait. The Panel recommends no compensation for this loss element.

(e) Expenses of six employees delayed in Baghdad

178. Six of Telecomplect's employees stayed in Kuwait until 25 August 1990, on which date they were evacuated to Baghdad. A few days later they attempted to leave Iraq, but were stopped at the Iraq/Turkish border by Iraqi authorities and sent back to Baghdad. They returned to Kuwait for three days in September with the object of saving some of Telecomplect's assets, and then remained in Baghdad until 15 November 1990, when they finally returned to Bulgaria. Telecomplect claims compensation in the amount of KWD4,425 for expenses incurred by the six, namely, electricity/telephone, miscellaneous purchases from the Bulgarian embassy, petrol, taxis, bus tickets for the evacuation of the wife and children of one of the employees, and air tickets for the six employees from Baghdad to Sofia.

179. The Panel finds that Telecomplect has not provided sufficient evidence to explain how the electricity/telephone expenses, the miscellaneous purchases from the Bulgarian embassy, and the petrol expenses incurred in October 1990 were directly caused by Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation in respect of these items.

180. The Panel finds that the petrol expenses of ID16 and ID14 incurred on 24 August 1990 and 25 August 1990 in the evacuation of the six employees from Kuwait to Baghdad, the taxi fare of US$100 incurred by the six employees when they attempted to leave Iraq in late August 1990, and the expense of ID76 in respect of the bus tickets for the wife and children of one of the detained employees were directly caused by Iraq's invasion and occupation of Kuwait. The Panel recommends compensation in the amounts of ID106 (US$341) and US$100 for these items.

181. The Panel finds that Telecomplect has provided no evidence in support of its claim for the air tickets of the six employees. The Panel recommends no compensation for this item.

3. Recommendation for payment or relief to others

182. The Panel recommends compensation in the amount of US$162,196 for payment or relief to others.

D. Financial losses

183. Telecomplect seeks compensation in the amount of KWD6,587 for financial losses in respect of (a) deposits which various public utilities have refused to refund because the relevant documents had been destroyed in the invasion (KWD3,899); and (b) residence penalties which various employees of Telecomplect have failed to refund (KWD2,688).

184. In its claim form, Telecomplect had characterised these loss elements as claims for payment or relief to others, but the Panel finds that they are more accurately described as financial losses.

185. In relation to loss element (a), Telecomplect asserts that it lost documents relating to (i) a telephone subscriber guarantee with the Ministry of Communication; (ii) an electricity supply guarantee with the Ministry of Electricity Works; (iii) a guarantee for two oxygen bottles; and (iv) a cabinets supply guarantee for Saudi Arabia. Because it lost these documents, Telecomplect asserts that it could not obtain a refund of the relevant deposits. Telecomplect has also included in this loss element a claim for telephone calls by an employee (KWD186) and a claim for property that was in the custody of a guard which went missing (KWD323).

186. In relation to loss element (b), Telecomplect asserts that it paid fines to the Kuwaiti authorities in July 1990 on behalf of its local workers in relation to delays in the extension of the workers' visas. The fines were due to be deducted from the workers' salaries over a number of months (unspecified) from July 1990. The amounts were never deducted because the workers departed from Kuwait when Iraq invaded Kuwait. The non-refunded fines total KWD2,688, the amount for which Telecomplect seeks compensation.

187. Telecomplect has provided no evidence in support of its claim for financial losses. In particular, it has provided no evidence of any attempt to recover the deposit guarantees from the service providers, or the residence penalties from the workers.

188. The Panel recommends no compensation for financial losses.

E. Mitigation expenses

1. Facts and contentions

189. Telecomplect seeks compensation in the amount of KWD10,270 for expenses arising out of its attempts to mitigate its losses. Its claim comprises four heads: (a) cost of transporting materials to a safer place/delivering seven cars out of Kuwait (KWD1,100); (b) cost of arranging new car registration (KWD1,600); (c) cost of transporting 11 cars out of Kuwait to Bulgaria (KWD5,559); and (d) cost of transporting nine cars from Bulgaria back to Kuwait (KWD2,011).

190. In its claim form, Telecomplect had characterised loss elements (b), (c) and (d) as claims for payment or relief to others, but the Panel finds that they are more accurately described as mitigation expenses.

2. Analysis and valuation

(a) Transporting material to a safer place/delivering seven cars out of Kuwait

191. Telecomplect asserts that in November 1990 it paid a local citizen of Kuwait, "Mr Alfar", to help protect some of Telecomplect's assets. Mr Alfar allegedly transported some materials and equipment from Telecomplect's warehouse to three safer locations in Kuwait, and led seven of Telecomplect's cars out of Kuwait.

192. The Panel finds that the cost of transporting the materials and equipment to a safer place and delivering the seven cars out of Kuwait, is compensable as a mitigation expense incurred in good faith and at reasonable cost. The Panel finds that Telecomplect has provided sufficient evidence to support the claim.

193. The Panel recommends compensation in the amount of KWD1,100 (US$3,806) for this loss element.

(b) Cost of arranging new car registration

194. Telecomplect asserts that it avoided the confiscation of its vehicles by Iraq by obtaining new car registration papers. It asserts that it paid "Mr Alfar" KWD1,600 to obtain the papers.

195. The Panel finds that the cost of arranging the new car papers is compensable as a mitigation expense incurred in good faith and at reasonable cost. The Panel finds that Telecomplect has provided sufficient evidence to support the claim.

196. The Panel recommends compensation in the amount of KWD1,600 (US$5,536) for this loss element.

(c) Cost of transporting 11 cars out of Kuwait to Bulgaria

197. In order to save some of its vehicles, Telecomplect decided to drive 11 of them from Kuwait to Bulgaria. Telecomplect seeks compensation in the total amount of KWD5,559 for the expenses of the trip, including the cost of flying two employees from Bulgaria to Iraq to undertake the trip, the cost of bus tickets for nine employees bussed from Bulgaria to Iraq to undertake the trip, petrol, accommodation, customs/taxes, and the business trip allowances of the 11 employee drivers.

198. The Panel finds that Telecomplect has provided sufficient evidence that it incurred the following costs in respect of the trip, and that the costs are compensable as mitigation expenses incurred in good faith and at reasonable cost:

Table 1: Cost of transporting 11 cars out of Kuwait to Bulgaria

Cost	Original currency		US$ conversion	
Air tickets for two employees	BGL	2610	USD	870
Bus tickets for nine employees	BGL	22,223	USD	7,408
Petrol expenses	TRL	1,736,200	USD	645
	KWD	65	USD	225
	IQD	40	USD	129
Car registration forms	USD	550	USD	550
Accommodation expenses	SYP	3,750	USD	334
	TRL	3,112,995	USD	1,156
Customs	SYP	9,556	USD	851
Road taxes	TRL	242,000	USD	90
Business trip allowances	USD	4,101	USD	4,101
Total			USD	16,359

199. The Panel recommends compensation in the total amount of US$16,359 for the cost of transporting 11 cars from Kuwait to Bulgaria.

(d) Cost of transporting nine cars from Bulgaria back to Kuwait

200. Telecomplect asserts that after the invasion cars were very expensive in Kuwait, and therefore, when it renewed its activity in Kuwait, it decided to drive nine of its cars back to Kuwait from Bulgaria. It seeks compensation in the total amount of KWD2,011 for the expenses of this trip including the cost of car permits, visas, insurance, petrol, car repairs, accommodation, taxes, and the business trip allowances of the nine employee drivers.

201. The Panel finds that Telecomplect has provided sufficient evidence that it incurred the following costs in respect of the trip, and that the costs are compensable as mitigation expenses incurred in good faith and at reasonable cost:

Table 2: Cost of transporting nine cars from Bulgaria back to Kuwait

Cost	Original currency		US$ conversion	
Car permits	SYP	706	USD	63
Visa entries	JOD	36	USD	55
	SYP	2,250	USD	200
Insurance	BGL	738	USD	246
	JOD	64	USD	97
	SYP	810	USD	72
Petrol expenses	BGL	1,800	USD	600
	TRL	2,910,945	USD	1081
	JOD	18		
	SAR	744	USD	27
			USD	199
Car repairs	JOD	60	USD	91
Accommodation expenses	JOD	506	USD	769
	TRL	196,762	USD	73
Various taxes	TRL	150,000	USD	56
	SAR	450	USD	120
	JOD	84	USD	128
Business trip allowances	USD	2,520	USD	2,520
Total			USD	6,397

202. The Panel recommends compensation in the total amount of US$6,397 for the cost of transporting nine cars from Bulgaria back to Kuwait.

3. Recommendation for mitigation expenses

203. The Panel recommends compensation in the amount of US$32,098 for mitigation expenses.

F. Claim preparation costs

204. Telecomplect seeks compensation in the amount of KWD7,033 for claim preparation costs, including the cost of photographs taken in Kuwait after the war for the purposes of its claim. Applying the approach taken with respect to claim preparation costs set out in paragraph 40, the Panel makes no recommendation for claim preparation costs.

G. Interest

205. Telecomplect seeks compensation in the amount of KWD42,615 for interest calculated at the rate of 7 percent simple interest from 2 August 1990 until the date of the submission of its statement of claim on 31 December 1993. Applying the approach taken with respect to interest set out in paragraphs 36 to 37, the Panel makes no recommendation in respect of interest.

H. Summary of recommended compensation for Telecomplect

206. Based on its findings regarding Telecomplect's claim, the Panel recommends compensation in the amount of US$265,180. The Panel finds the date of loss to be 2 August 1990.

VII. THE CLAIM OF CHINA CIVIL ENGINEERING CONSTRUCTION CORPORATION

207. China Civil Engineering Construction Corporation ("China Civil"), is a Chinese state-owned enterprise which provides technical labour for overseas civil works.

208. In its original claim dated 16 March 1993, China Civil sought compensation in the amount of US$682,212 for lost profits on five labour contracts; evacuation expenses for 319 of its employees evacuated from Iraq and Kuwait; and rental paid in advance.

209. In a revised statement of claim submitted to the Commission on 23 December 1998, China Civil increased the amounts of the existing loss elements and submitted five new loss elements. China Civil submitted another new loss element in its Article 34 response submitted to the Commission on 8 January 1999. This brought the total amount of its claim to US$9,224,548.

210. Applying the approach taken with respect to amending claims after filing set out in paragraphs 54 to 56, the Panel does not take into account the new loss elements submitted in the revised statement of claim, or the new loss element submitted in the Article 34 response.

A. Loss of profits

211. China Civil seeks compensation in the amount of US$110,821 (increased to US$516,179 in the revised statement of claim) for the loss of profits on five contracts for the supply of labour. One contract was being performed in Iraq and the other four were Kuwaiti based.

212. In its claim form, China Civil had characterised this claim as a claim for contract losses, but the Panel finds that it is more accurately described as a loss of profits claim.

213. In its original statement of claim, China Civil calculates its loss of profits by adding together two components, namely, 15 percent of the monthly salary payments which remain payable on the contract, and a "mobilisation fee" multiplied by the number of workers the subject of the particular contract.

214. In its revised statement of claim, China Civil calculates its loss of profits by deducting monthly expenses from the monthly salaries payable under the respective contract. The Panel notes that this results in a profit rate for each of the five contracts of between 30 percent and 45 percent, depending on the particular contract.

215. Applying the approach taken with respect to loss of profits on a particular project set out in paragraphs 87 to 92, the Panel recommends no compensation for loss of profits.

B. Payment or relief to others

1. Facts and contentions

216. China Civil seeks compensation in the amount of US$473,811 (increased to US$489,890 in the revised statement of claim) arising out of the evacuation of 319 employees (increased to 320 employees in the revised statement of claim) out of Kuwait and Iraq. The claim is constituted by: (a) airfares (US$311,726; decreased to US$311,688 in the revised statement of claim); (b) war risk insurance premium (US$114,235; decreased to US$114,202 in the revised statement of claim); and (c) accommodation and other expenses incurred by the evacuees in Iraq/Kuwait, Jordan and China (US$47,850; increased to US$64,000 in the revised statement of claim).

2. Analysis and valuation

(a) Airfares

217. The Panel finds that China Civil has provided sufficient evidence that it incurred the cost of airfares for its evacuees. It has provided a list of the names of all 320 evacuees, and two separate lists of the names of 56 evacuees from Iraq and the names of 264 evacuees from Kuwait. It has provided duplicate receipts issued by Air China, dated 21 August 1990. One receipt is for the amount of RMB1,472,000, and the other is for the same amount stated in US dollars, ie, US$311,688 (US$974 per person).

218. China Civil states that "as stipulated in the labour service contracts signed between CCECC and Iraqi or Kuwait employers, the round-trip airfare or return-trip airfare should be borne by employers". An examination of the terms of the labour contracts provided by China Civil shows that the Iraqi/Kuwaiti employer would have borne the cost of the airfare from Iraq/Kuwait back to China on natural completion of the contract, in respect of 170 workers which China Civil had despatched to Iraq/Kuwait. China Civil would have borne the cost in respect of 133 workers. There is no evidence of who would have borne the cost of the airfares for the remaining 17 workers.

219. In respect of the 170 workers for whose repatriation the employer would have paid on natural completion of the contract, the costs of the airfares incurred by China Civil exceeded the costs which China Civil would have incurred in any event. Accordingly the Panel reccomends compensation in the amount of US$165,508 for these 170 workers.

220. In respect of the 133 workers for whose repatriation China Civil would have paid on natural completion of the contract, there is no evidence that the airfares for the evacuation exceeded the airfares which China Civil would have incurred in any event. The Panel recommends no compensation for the airfares of these 133 workers.

221. The Panel is unable to recommend compensation in respect of the remaining 17 workers as it has no evidence of who would have borne the cost of their repatriation.

(b) War risk insurance premium

222. The Panel finds that China Civil has provided sufficient evidence to substantiate its claim for the "war risk insurance premium". This was an additional charge levied by the airline that China Civil had to pay in the circumstances to be able to evacuate its employees and that related to increased risk in the Middle East war. China Civil has provided duplicate receipts issued by Air China, dated 23 October 1990. One receipt is for the amount of RMB539,429, and the other is for the same amount stated in US dollars, ie, US$114,202.

223. The Panel recommends compensation in the amount of US$114,202 for the war risk insurance premium.

(c) Accommodation and other expenses

224. China Civil provided no evidence that it incurred the accommodation and other expenses of the 320 evacuees. The Panel recommends no compensation for this loss element.

3. Recommendation for payment or relief to others

225. The Panel recommends compensation in the amount of US$279,782 for payment or relief to others.

C. Financial losses

226. China Civil seeks compensation in the amount of US$97,580 (increased to US$118,061 in the revised statement of claim) for the loss of advance rental allegedly paid in respect of its Iraqi branch office.

227. The Panel finds that the prepaid rent is part of the overheads of China Civil. Applying the approach taken with respect to head office and branch office expenses set out in paragraphs 82 to 86, the Panel recommends no compensation for prepaid rent.

D. Summary of recommended compensation for China Civil

228. Based on its findings regarding China Civil's claim, the Panel recommends compensation in the amount of US$279,782. The Panel finds the date of loss to be 2 August 1990.

VIII. THE CLAIM OF CHINA HARBOUR ENGINEERING COMPANY

229. China Harbour Engineering Company ("China Harbour") is a Chinese state-owned enterprise which was involved in the provision of labour and civil construction in Kuwait. China Harbour seeks compensation in the amount of US$2,623,588 for loss of tangible property, payment or relief to others and rental paid in advance.

A. Loss of tangible property

1. Facts and contentions

230. China Harbour seeks compensation in the amount of US$836,203 for the loss of: (a) tangible property located in China Harbour's Kuwaiti office (US$192,042); (b) property located on project sites where China Harbour was working as a subcontractor (US$52,811); (c) eight vehicles owned by China Harbour (US$96,980); and (d) 19 vehicles borrowed by China Harbour for the purpose of evacuating its employees (US$494,370).

2. Analysis and valuation

(a) Loss in Kuwaiti office

231. China Harbour asserts that the property located in its Kuwaiti office, consisting mainly of office furniture, office equipment, electrical equipment and household goods, was either stolen or destroyed by the Iraqis.

232. The Panel finds that China Harbour has provided sufficient evidence to prove that it lost some tangible property in a Kuwaiti office. It has provided a copy of a lease agreement for a villa in Kuwait, and a receipt for the payment of rental for the period 15 July 1990 to 15 October 1990. It has provided a declaration dated 27 May 1993 by the landlord of the villa which states that he rented the villa to China Harbour as their office and residence, that after the invasion China Harbour left the property in the "attached Inventory List" in the villa, and that all of the items on the list were lost or damaged in the invasion.

233. However, the only evidence of ownership of the property is three illegible receipts. China Harbour has provided no evidence of the age or value of the property. It has not even stated which property in the Inventory List was damaged, and which was lost.

234. The Panel recommends no compensation for this loss element.

(b) Loss on project sites

235. China Harbour states that it was working on a number of project sites in Kuwait. It asserts that it lost construction machinery on the site of

the "4 seaside villas project" in Fahall, Kuwait; and construction machinery and medical appliances on the campsite of the Kuwait University and the Kuwaiti Royal Palace projects.

236. The Panel finds that China Harbour has not provided sufficient evidence to substantiate its claim for loss of property on the project sites. It has only provided copies of the three sub-contract agreements for the projects on which it was working. These contracts merely describe the obligation of China Harbour to provide labour and management personnel and in two of the contracts, also hand tools, in respect of the relevant project.

237. China Harbour has provided no evidence of ownership of the construction machinery or medical appliances, or that the property was on the project sites at the time of the invasion. There is no evidence that the property was destroyed.

238. The Panel recommends no compensation for this loss element.

(c) Loss of own vehicles

239. China Harbour asserts that "after the said invasion and occupation, all of the automobiles of our company were robbed and damaged by the Iraq soldiers".

240. The Panel finds that China Harbour has not provided sufficient evidence to substantiate its claim for the loss of eight vehicles. In respect of five of the eight vehicles claimed, China Harbour provided the registration certificates issued in the name of an individual owner, and a declaration by the relevant individual that China Harbour has "the full right on the ... vehicle". China Harbour asserts that the files of the remaining three vehicles were lost during the invasion. China Harbour has provided no evidence of the value of the vehicles or of the loss of any of the vehicles.

241. The Panel recommends no compensation for this loss element.

(d) Loss of borrowed vehicles

242. China Harbour asserts that in evacuating its employees from Kuwait, it had to borrow 19 vehicles from the contractors with which it was working. It borrowed 10 from United Gulf Construction Corporation ("UGCC"), five from Consolidated Contractors International Company, and four from Hamla Corporation. It asserts that it had to abandon the vehicles on the way from Kuwait to Jordan.

243. China Harbour asserts that it paid an amount of KWD57,500 to UGCC to cover the loss of 10 of the vehicles. In respect of the remaining nine

vehicles, China Harbour indicates that it will pay for these losses only when compensation from the Commission is received.

244. The Panel finds that China Harbour has provided no evidence to substantiate its claim in respect of the five vehicles borrowed from Consolidated Contractors International Company and the four vehicles borrowed from Hamla Corporation. The Panel recommends no compensation in respect of these nine vehicles.

245. The Panel finds that China Harbour has provided sufficient evidence to substantiate its claim in respect of the 10 vehicles borrowed from UGCC. It has provided correspondence between itself and UGCC arranging the loan of the vehicles. The abandonment of the vehicles is evidenced by a letter from China Harbour to UGCC stating that the vehicles were abandoned on the way from Kuwait to Jordan and offering a certain amount in settlement; and by the affidavits of five of its employees describing their evacuation, all of which refer to the abandonment of various vehicles. The final settlement amount of KWD57,500 is detailed in two letters from China Harbour to UGCC, and there is a translation of a receipt for this amount from UGCC.

246. The Panel recommends compensation in the amount of KWD57,500 (US$198,962) for the loss incurred in respect of the 10 vehicles borrowed from UGCC.

3. Recommendation for loss of tangible property

247. The Panel recommends compensation in the amount of KWD57,500 (US$198,962) for loss of tangible property.

B. Payment or relief to others

1. Facts and contentions

248. China Harbour seeks compensation in the amount of US$1,779,224 for payment or relief to others. It asserts that it evacuated its 663 employees from Kuwait to China via Amman, Jordan and incurred all expenses. It seeks compensation in respect of: (a) expenditure on the road from Kuwait to Amman, including food, hotels and "out-of-pocket" expenses, for 663 employees (KWD33,150); (b) one month's wages for 663 employees (US$168,960); (c) airfares from Amman to China for 663 employees (US$811,512); (d) the cost of transport within China to repatriate 648 of the employees (CNY102,450); and (e) repatriation allowances for 663 employees (CNY3,135,600).

2. Analysis and valuation

(a) Expenditure from Kuwait to Amman

249. The Panel finds that China Harbour has provided sufficient evidence to substantiate the claim for expenditure from Kuwait to Amman, including a list of the names and passport numbers of the 663 employees, copies of its sub-contracts showing a requirement for a labour force of the stated size, and affidavits of five of its employees describing the evacuation from Kuwait to China.

250. The Panel recommends compensation in the amount of KWD33,150 (US$114,706) for this loss element.

(b) Wages

251. The Panel finds that China Harbour has submitted sufficient evidence in support of this claim. It has provided a translation of its Payroll for Wage of August 1990, listing the 663 employees by name, passport number, nationality and the amount of their wage.

252. The Panel recommends compensation in the amount of US$168,960 for this loss element.

(c) Airfares

253. The Panel finds that China Harbour has submitted sufficient evidence that it incurred the cost of airfares for 663 evacuees. It has provided copies of two receipts issued by Air China in respect of 663 passengers in two flights from Amman to Beijing for a total cost of US$811,512. Affidavits of five of China Harbour's employees all refer to travelling from Amman to Beijing by plane.

254. However, China Harbour was requested in an Article 34 notification to explain how the costs claimed would have exceeded the costs which would have been incurred in any event in repatriating its employees on natural completion of its contracts in Kuwait. China Harbour responded that the payment "was directly related to the unlawful invasion due to their unexpected short term service". The Panel finds that there is no evidence that the cost of the 663 airfares exceeded the cost which China Harbour would have incurred in repatriating its employees after natural completion of its contracts in Kuwait.

255. The Panel recommends no compensation for this loss element.

(d) Transport within China

256. China Harbour has provided no evidence in support of this claim. The Panel recommends no compensation for this loss element.

(e) Repatriation allowances

257. The Panel finds that China Harbour has provided sufficient evidence to substantiate this claim. It has provided translated "financial sheets" showing the names, amounts paid for repatriation allowance, and recipient signatures of its 663 employees.

258. The Panel recommends compensation in the amount of CNY3,135,600 (US$664,041) for this loss element.

3. Recommendation for payment or relief to others

259. The Panel recommends compensation in the amount of US$947,707 for payment or relief to others.

C. Financial losses

260. China Harbour characterised this loss element as a claim for payment or relief to others, but the Panel finds that it is more accurately described as a financial loss.

261. China Harbour seeks compensation in the amount of KWD2,400 for pre-paid rent. It asserts that it made a payment in the amount of KWD3,600 for the period 15 July to 15 October 1990 in respect of the rental of a house in Kuwait. Because it had to cease its operations right after the invasion, China Harbour asserts that it lost the value of two-thirds of the rental.

262. The Panel finds that the prepaid rent is part of the overheads of China Harbour. Applying the approach taken with respect to head office and branch office expenses set out in paragraphs 82 to 86, the Panel recommends no compensation for prepaid rent.

D. Summary of recommended compensation for China Harbour

263. Based on its findings regarding China Harbour's claim, the Panel recommends compensation in the amount of US$1,146,669. The Panel finds the date of loss to be 2 August 1990.

IX. THE CLAIM OF THE GENERAL COMPANY FOR LAND RECLAMATION

264. The General Company for Land Reclamation ("General Company") is an Egyptian registered company. It had a contract with the State Organisation of Soil and Land Reclamation ("SOSLR") for the reclamation of saline land situated in El Roz El Shamaly, Diala Province, Iraq, for which a Final Certificate of Completion had been issued on 14 February 1990. It was in the process of completing the administrative requirements necessary to wind down its Iraqi branch and to export its property from Iraq to Egypt at the time of Iraq's invasion and occupation of Kuwait on 2 August 1990.

265. In its claim dated 30 September 1993, General Company sought compensation in the amount of US$4,929,899 for contract losses, loss of tangible property, and loss of funds in an Iraqi bank account.

266. In a submission to the Commission on 8 January 1999, after General Company had managed to export or sell some of its property, and deposited the proceeds of the sales in its Iraqi bank account, General Company reduced the loss element relating to tangible property from US$3,076,531 to US$958,549, and increased the loss element relating to funds in an Iraqi bank account from ID106,198 to ID2,556,594. It also submitted two new loss elements. This brought the total amount of its claim to US$14,778,645.

267. Applying the approach taken with respect to amending claims after filing set out in paragraphs 54 to 56, the Panel does not take into account the two new loss elements submitted on 8 January 1999.

A. Contract losses

268. General Company seeks compensation in the amount of ID40,346 for retention monies which it asserts were due to it as a result of the land reclamation contract with SOSLR.

269. The land reclamation contract began in 1978 with a contract period of 1000 days, followed by a number of contract extensions, and General Company asserts that its work was "fully executed" by 14 February 1990. The amount of retention monies held at this time was ID276,325. It appears there was then some negotiation about the amount outstanding because General Company agrees that it is owed a reduced amount of ID40,346.

270. The Panel finds that the employer in this case, the SOSLR, is an agency of the State of Iraq.

271. General Company has submitted parts of the contract documentation and copies of correspondence with SOSLR. From the documentation submitted, the Panel is unable to conclude when the retention monies were due to be released. General Company has stated that a Final Certificate of Completion was issued by the Iraqi authorities on 14 February 1990. The Panel finds that since the relevant work was completed prior to 2 May 1990,

and in so far as the Panel can determine, the retention monies should have been released prior to that date, the Panel does not have jurisdiction to consider the claim for the retention monies.

272. The Panel recommends no compensation for retention monies arising out of the contract with SOSLR.

B. Loss of tangible property

273. General Company seeks compensation in the amount of US$958,549 for loss of property comprising plant, vehicles and caravans, which it asserts was confiscated by the Iraqi authorities. It also seeks compensation in the amount of US$1,384,440 for loss of the use of this property.

274. General Company asserts that it had completed the land reclamation contract with SOSLR by 1990 and was seeking to obtain the approvals necessary to re-export its property out of Iraq. On 17 April 1992, the Iraqi Government allegedly issued a decree confiscating the property of non-Iraqi companies. General Company has managed to export or sell locally some of its property, but it seeks compensation in the amount of US$958,549 for the property which remains confiscated.

275. General Company calculated its claim of US$1,384,440 for the loss of the use of the property at a rate of return ranging from 15 percent to 20 percent of the value of the various items of property, for the period August 1990 to August 1993.

276. The Panel finds that the confiscation of property by an agency of the Government of Iraq in 1992 was not directly caused by Iraq's invasion and occupation of Kuwait in August 1990.

277. The Panel recommends no compensation for the loss of tangible property or for the loss of the use of the tangible property.

C. Financial losses

278. General Company seeks compensation in the total amount of ID2,556,594 for funds held in an Iraqi bank account which it claims it could not access after Iraq's invasion and occupation of Kuwait.

279. Applying the approach taken with respect to loss of funds in a bank account in Iraq set out in paragraphs 96 to 101, the Panel recommends no compensation for loss of the funds.

D. Summary of recommended compensation for General Company

280. Based on its findings regarding General Company's claim, the Panel recommends no compensation.

X. THE CLAIM OF CIPEC

281. CIPEC ("CIPEC"), a French company, submitted only the category "E" claim form, and other untranslated documents in support of its stated losses. CIPEC seeks compensation in the amount of US$79,359.

282. On 23 June 1998, CIPEC was sent a notification under article 15 of the Rules requesting it to comply with the formal requirements for filing a claim. CIPEC was requested to reply on or before 25 September 1998. CIPEC did not submit a reply. On 14 January 1999, CIPEC was sent a formal notification of the deficiencies of its claim as filed. The deadline for CIPEC to reply was 15 March 1999. CIPEC did not submit the documentation requested.

283. On 8 September 1998, CIPEC was sent a notification under article 34 of the Rules requesting it to furnish further evidence to develop its claim. CIPEC was requested to reply on or before 8 January 1999. CIPEC did not submit a reply. On 12 January 1999, CIPEC was sent a second notification under article 34 of the Rules. The deadline for CIPEC to reply was 26 January 1999. CIPEC did not submit the documentation requested.

284. The Panel finds that CIPEC did not submit sufficient information or documentation to support its asserted losses.

285. The Panel recommends no compensation.

XI. THE CLAIM OF FREYSSINET INTERNATIONAL ET COMPAGNIE

286. Freyssinet International et Compagnie ("Freyssinet") is a French registered limited liability company involved in concrete prestressing and post-tensioning, technical assistance on civil works and all activities relating to construction processes and systems both for erection of structures, and repairs. Freyssinet seeks compensation in the total amount of US$3,334,131 for contract losses in respect of seven contracts, loss of profits, loss of tangible property, payment or relief to others, financial losses, and property losses of three of its employees.

A. Contract losses

287. Freyssinet seeks compensation in the total amount of KWD52,308 for contract losses on seven contracts.

288. The Panel notes that Freyssinet has provided little explanation of its claim. Nevertheless, the Panel has determined that in respect of the seven contracts, Freyssinet seeks compensation for: (i) interest at the rate of 10 percent per annum on late payments made under the relevant contract, calculated from August 1990 to the date the payment was made, which Freyssinet calls "loss on recovery" or "interests"; and in one case (ii) an amount owing on the contract which has never been paid, which Freyssinet calls "loss for non recovery" or "loss on principal". The total amount claimed in respect of the seven contracts is KWD52,308.

289. The only evidence submitted by Freyssinet is part of the relevant sub-contract agreement in relation to six of the seven contracts. The Panel finds that Freyssinet has failed to demonstrate that its contract losses were directly caused by Iraq's invasion and occupation of Kuwait.

290. The Panel recommends no compensation for contract losses.

B. Loss of profits

291. Freyssinet seeks compensation for loss of profits in the amount of KWD38,500. Its only explanation of its claim is as follows:

> "The previsionnal [sic] margin of the Kuwait branch for the year 1990 was KD64,500. Due to the conflict it was only KD17,882. The loss is so KD46,618 which gives FRF1,305,304. The previsionnal [sic] margins for the Kuwait branch for the year 1991 was KD72,000 and KD38,500 for the period coming from january to end of May 1991. The loss is consequently KD38,500 which gives FRF1,078,000 including interest. The global loss of profits is consequently FRF2,383,304."

292. Applying the approach taken with respect to loss of profits for future projects set out in paragraphs 93 to 95, the Panel recommends no compensation.

C. Overheads under recovered

293. Freyssinet seeks compensation in the amount of KWD326,592 for overheads under recovered.

294. The claim is not clearly explained. It appears that Freyssinet expected that its turnover for the Kuwaiti branch for 1990 would be KWD587,950. Freyssinet asserts that due to the conflict, it was actually KWD183,852. It assesses its head office overheads on the basis of 12 percent of the branch office turnover. It calculates under-recovered overheads for the year 1990 as KWD151,536.

295. Freyssinet makes a similar calculation for 1991, asserting that its under-recovered overheads for that year are KWD175,056.

296. In support of its claim, Freyssinet has submitted a summarised list of contract values and turnovers for the year 1990, a statement of income for the year ending 31 December 1991, a profit realisation schedule as at June 1990, and its annual report for 1989. Applying the approach taken with respect to head office and branch office expenses set out in paragraphs 82 to 86, the Panel recommends no compensation.

D. Loss of tangible property

297. Freyssinet seeks compensation in the amount of KWD16,195 for loss of tangible property located in its Kuwaiti branch office, and compensation in the amount of FRF7,408,111 for loss of its "income producing property".

298. The Panel finds that Freyssinet has not provided sufficient evidence to substantiate its claim for branch office property. It provided a list of furniture and office equipment, but it has not explained how this list correlates to its claim of KWD16,195. The only other evidence it has provided is a collection of 20 invoices, some of which have not been translated, some of which are illegible and some of which are made out to individuals whose relationship with Freyssinet has not been explained.

299. The Panel finds that Freyssinet has not produced sufficient evidence to substantiate its claim for income-producing property. The only evidence provided is a list, produced by itself, of 30 items of "lost income-producing property"; a collection of debit notes for the export into Kuwait of various items of property between 1984 and 1989, a number of which are not translated or not cross-referenced to the list of 30 items; and a price list of a supplier of some of its equipment.

300. Freyssinet has provided no evidence that it still owned any of the above property at the time of the invasion or that the property was in Kuwait at the time of the invasion. It has provided no evidence of the loss of any of the property.

301. The Panel recommends no compensation for loss of tangible property.

E. Payment or relief to others

302. Freyssinet seeks compensation for: (a) repatriation expenses paid to five of its employees for repatriation to their home countries after the invasion (FRF241,996); and (b) salaries and other amounts paid to three of its employees (two of whom were allegedly held hostage) for certain periods after the invasion (FF1,262,683).

303. The Panel finds that Freyssinet has not provided sufficient evidence in relation to the "repatriation expenses" to enable the Panel to determine whether they were losses directly caused by Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for this loss element.

304. The Panel finds that Freyssinet has not provided sufficient evidence that it incurred losses in respect of salaries paid to three of its employees. It has provided no evidence that the two employees were in fact taken hostage or detained. It has submitted copies of two wage certificates, but the claimed amount is not readily apparent from the documents submitted. The Panel recommends no compensation for salaries.

305. The Panel recommends no compensation for payment or relief to others.

F. Personal effects of three employees

306. Freyssinet seeks compensation in the amount of FRF700,000 for the loss of the personal effects of three of its employees. The Panel recommends no compensation for this loss element on the basis that the loss was not incurred by Freyssinet.

G. Summary of recommended compensation for Freyssinet

307. Based on its findings regarding Freyssinet's claim, the Panel recommends no compensation.

XII. THE CLAIM OF CHEMITHERM PLANTS AND SYSTEMS PVT LTD

308. Chemitherm Plants and Systems Pvt Ltd ("Chemitherm") is an Indian registered company. It seeks compensation in the total amount of US$250,502 for contract losses and related financial losses.

A. Contract losses

309. Chemitherm seeks compensation in the amount of US$152,217 for contract losses. Chemitherm entered into an agreement dated 17 February 1990 with a Kuwaiti based company, Alinjaz Contracting Company S.A.K. ("Alinjaz") for the supply of eight stainless steel storage tanks, four pressure vessels and two instrument columns for a telecommunications project in Kuwait. It asserts that it had completed the manufacture of the equipment and was ready to load the shipment by 8 August 1990. Chemitherm states that it was prevented from shipping the equipment because Iraq's invasion of Kuwait on 2 August 1990 disrupted "shipping facilities to Kuwait" and also caused "total disruption of documents negotiation and other commercial transaction".

310. The Panel is satisfied that Chemitherm has provided sufficient evidence to prove that it entered the contract with Alinjaz, that the equipment was ready for shipment to Kuwait in August 1990, and that it was prevented from shipping the equipment to Kuwait due to Iraq's invasion and occupation of Kuwait.

311. However, Chemitherm has provided no evidence explaining why the equipment could not be shipped to Kuwait after the cessation of hostilities in Kuwait, or why it remained unpaid after this date. It has provided no evidence of any attempt to mitigate its loss, for example, by selling the equipment elsewhere. Accordingly, the Panel determines that Chemitherm's contract losses were not directly caused by Iraq's invasion and occupation of Kuwait.

312. The Panel recommends no compensation for contract losses.

B. Financial losses

313. Chemitherm makes two separate claims in respect of financial losses. Firstly, it seeks compensation in the amount of US$30,730 for interest on a 180 day letter of credit which it obtained in order to manufacture the equipment, and which it asserts it could not repay because of the inability to deliver the equipment. Secondly, it seeks compensation in the amount of US$67,555 for customs duty assessed on the equipment, which only became payable because the equipment could not be exported from India.

314. The Panel finds that Chemitherm has not provided sufficient evidence to substantiate its claim for financial losses. The only evidence provided in relation to the claim for interest is a letter from the State Bank of

India dated 15 February 1993 requesting that Chemitherm's account be "regularised". It has provided no evidence of how the interest claimed was calculated, or that it paid the interest.

315. In relation to the claim for customs duty, Chemitherm has provided a letter from customs dated 6 March 1993 advising that Chemitherm had not fulfilled its export obligations in respect of materials allowed duty free clearance, and was therefore liable to pay customs duty of 24 percent on the goods. It has also provided what appears to be the original customs form, stating the amount of "duty leviable but for exemption". However, Chemitherm has provided no evidence that it paid the duty.

316. The Panel recommends no compensation for financial losses.

C. Summary of recommended compensation for Chemitherm

317. Based on its findings regarding Chemitherm's claim, the Panel recommends no compensation.

XIII. THE CLAIM OF MURAZUMI CONSTRUCTION CO. LTD

318. Murazumi Construction Co. Ltd ("Murazumi") is a Japanese civil construction company which was operating in Kuwait at the time of Iraq's invasion and occupation of Kuwait. It specialised in "field marine construction works" and had office, store, berthing and service facilities in Kuwait, as well as considerable equipment and vessels. Murazumi asserts that its vessels, equipment and materials were destroyed in Iraq's invasion and occupation of Kuwait and it was thereby forced to withdraw from Kuwait. It seeks compensation in the total amount of US$1,599,843 for loss of tangible property and payment or relief to others.

319. In a submission to the Commission on 23 December 1998, Murazumi submitted a new loss element of JPY20,674,240 for "Sub-contractor Compensation". Applying the approach taken with respect to amending claims after filing set out in paragraphs 54 to 56, the Panel does not take into account this new loss element.

A. Loss of tangible property

1. Facts and contentions

320. Murazumi seeks compensation in the total amount of JPY203,738,000 for the loss of (a) 11 vessels (JPY195,240,000); (b) 24 items of equipment such as crawler cranes, shovels, generators and other heavy equipment machines (JPY20,049,000); (c) three temporary houses, materials such as sheet-piles and H-beams, and construction equipment such as hydraulic jacks and loading meters (JPY9,813,000); and (d) 16 items of office equipment, such as type-writers, desks, and lockers (JPY1,186,000).

321. Murazumi asserts that its 11 vessels were either sunk or damaged by Iraqi troops in the invasion of Kuwait on 2 August 1990. A survey report by Kuwait Maritime & Mercantile Company KSC ("KMM"), Lloyd's agents in Kuwait, describes the circumstances leading to the loss of three of the ships, and Murazumi asserts that the other eight ships were lost in similar circumstances. The survey report states that two vessels were moored at the Naval base at Ras Al Jalayah, and one vessel was moored at Shaiba Port, that the Iraqi occupying forces took control of both of these locations and that the crews were forced to abandon the vessels. The alleged fate of each of the 11 vessels is described in the table below:

Table 3: Fate of vessels

Vessel	Fate
Tug boat "Sultan 3"	"found floated"; tug control and navigation equipment missing
Tug boat "Sultan 5"	"found floated"
Deck barge "Sultan 6"	partly sunk, bomb damage
Crane barge "Sultan 7"	sunk "by leakage of water from stern tube over long period of time"
Anchor boat "Sultan 8"	"found floated", gunshot damage
Crane barge "Sultan 9"	"found floated"; barge equipment destroyed
Crane barge "Sultan 10"	sunk
Deck barge "Sultan 11"	"found floated", gunshot damage
Diver boat "Sultan 14"	"found floated"; fitted diving equipment missing
Diver boat "Sultan 15"	found stored at Murazumi's store; boat propeller, diving equipment missing
Diver boat "Sultan 16"	missing, "presumably stolen"

322. Murazumi asserts that the other property was lost or damaged as a result of the Iraqi troops' invasion and occupation of Kuwait.

323. In November 1991 Murazumi sold all of its vessels (including the missing vessel), and most of its other equipment for scrap. It paid an agent a 12 per cent commission fee to effect the sale. Murazumi therefore calculates its total claim for loss of tangible property as follows:

Total loss of tangible assets	JPY 226,288,000
Less salvage recovered	(JPY 25,625,000)
Add commission cost	JPY 3,075,000
Net loss of tangible assets	JPY 203,738,000

2. Analysis and valuation

(a) Vessels

324. The Panel finds that Murazumi has provided sufficient evidence to prove that it owned the 11 vessels, and that they were in Kuwait at the time of the invasion of Kuwait. It provided its "KT Index", which identifies the 11 vessels as "working at Kuwait Territory"; a copy of an

agreement dated 7 March 1990 for the lease by Murazumi of four berths at the Khiran Resort communication dock (Kuwait) for four of the 11 vessels, and a receipt for the rent; and hull insurance policies for the 11 vessels valid for waters in or near Kuwait.

325. The Panel finds that Murazumi has provided sufficient evidence that at least eight of the 11 vessels were lost, damaged, or put "out of use" due to Iraq's invasion and occupation of Kuwait. It has provided photographs of eight of the damaged vessels, and the survey report by KMM in respect of three of the vessels (which includes underwater video evidence of the two sunken vessels). The only vessels in respect of which there is no photographic or other evidence of loss or damage are two of the diver boats, namely, Sultan 14 and Sultan 15.

326. The Panel finds that Murazumi has not provided sufficient evidence of the value of its loss. The Panel finds that neither the insurance policies, nor the amount obtained on the scrap agreement, evidence the value of the vessels post-invasion. Given the likelihood that there would have been a demand for such vessels, even in a damaged state, subsequent to the liberation of Kuwait, the Panel finds that the actual value of the vessels at the time of the sale for scrap was substantially higher than the amount obtained. Equally, however, the Panel finds that Murazumi suffered a real loss as a result of Iraq's invasion and occupation of Kuwait, and the Panel assesses that real loss at JPY40,000,000.

327. The Panel recommends compensation in the amount of JPY40,000,000 (US$277,296) for loss of the vessels.

(b) Machines

328. The Panel finds that Murazumi has not provided sufficient evidence to substantiate its claim for the 24 items of machinery. The only evidence of ownership is "Attestations of Tests" on five crawler cranes by a Kuwaiti Surveyor. The Attestations do not describe Murazumi as the owner of the machines; they merely state that Murazumi requested the tests.

329. The Panel recommends no compensation for loss of the machines.

(c) Houses, materials and construction equipment

330. The Panel finds that Murazumi has not provided sufficient evidence to substantiate its claim for the houses, materials or construction equipment. It has provided no evidence of ownership.

331. The Panel recommends no compensation for this loss element.

(d) Office equipment

332. The Panel finds that Murazumi has not provided sufficient evidence to substantiate its claim for office equipment. It has provided no evidence of ownership.

333. The Panel recommends no compensation for loss of office equipment.

3. Recommendation for loss of tangible property

334. The Panel recommends compensation in the amount of JPY40,000,000 (US$277,296) for loss of tangible property.

B. Payment or relief to others

1. Facts and contentions

335. Murazumi seeks compensation in the total amount of JPY27,039,342 for: (a) insurance costs and relief expenses (JPY6,479,127); (b) hostage staff salary payments (JPY16,960,215); and (c) wreck clearance costs (JPY3,600,000).

2. Analysis and valuation

(a) Insurance costs and relief expenses

336. Murazumi seeks compensation for expenses incurred in respect of four of Murazumi's staff who were allegedly held hostage by Iraq for a period of four months, namely: (i) overseas travel accident insurance for the four staff; (ii) "workman compensation" insurance for the four staff; (iii) clothes expense for clothes sent to the four staff; (iv) medical expense for medicine sent to the four staff during the four months, and for a medical check after release; and (v) relief allowance which was paid to three of the four staff after their release.

337. The Panel finds that Murazumi has provided sufficient evidence that the four staff were held hostage in Kuwait.

338. The Panel finds that Murazumi has provided sufficient evidence to prove that it incurred the five expenses constituting the claim. It has provided translated payment vouchers in respect of the expenses, and receipts.

339. The Panel recommends compensation in the amount of JPY6,479,127 (US$44,916) for insurance costs and relief expenses.

(b) Hostage staff salary payment

340. Murazumi seeks compensation for salary which it continued to pay to "three direct employees and one supplied diver" while they were held hostage in Iraq for four months. The "supplied diver" was paid by his own employer, but Murazumi asserts that it reimbursed the employer.

341. The Panel finds that Murazumi has provided sufficient evidence to prove that it made salary payments to the four hostages. In respect of the three hostages employed by Murazumi, it provided translated payment vouchers. In respect of the diver whose employer it reimbursed, it provided a letter from the employer enclosing the payment certificates issued to the diver, and acknowledging that it had been reimbursed by Murazumi for the amount of the payment certificates.

342. The Panel recommends compensation in the amount of JPY16,960,215 (US$117,575) for hostage staff salary payments.

(c) Wreck clearance costs

343. Murazumi seeks compensation for the cost of clearing the wrecks of Sultan 7 and Sultan 10 from the entrance to the Kuwait Naval Base. Murazumi was the sub-contractor for marine works at Al-Julayia Port and had mobilised Sultan 7 and Sultan 10 to perform the works. When the vessels were sunk they became a navigation hazard and the Main Contractor ("TOA Corporation") was ordered by the Kuwaiti Ministry of Defence to clear the wreck. TOA Corporation entered a contract with M/S Integral Services Co to salvage and clear the wrecks for KWD37,000. TOA Corporation and Murazumi agreed that Murazumi should bear JPY3,600,000 of this cost.

344. The Panel finds that Murazumi has provided sufficient evidence to substantiate its claim for wreck clearance costs.

345. The Panel recommends compensation in the amount of JPY3,600,000 (US$24,957) for wreck clearance costs.

3. Recommendation for payment or relief to others

346. The Panel recommends compensation in the amount of JPY27,039,342 (US$187,448) for payment or relief to others.

C. Summary of recommended compensation for Murazumi

347. Based on its findings regarding Murazumi's claim, the Panel recommends compensation in the amount of US$464,744. The Panel finds the date of loss to be 2 August 1990.

XIV. THE CLAIM OF CORDEROY INTERNATIONAL LIMITED

348. Corderoy International Limited ("Corderoy") is a limited liability company registered in the United Kingdom, which provided chartered quantity surveyors, construction cost consultants and project managers for projects in Kuwait. Corderoy seeks compensation in the amount of US$95,852 for loss of profits, loss of tangible property, payment of salary to one of its employees, financial losses and claim preparation costs.

A. Loss of profits

349. Corderoy seeks compensation in the amount of £9,021 for loss of profits.

350. Between 1981 and 2 August 1990 Corderoy asserts that it had an agreement with consultant engineers, Brian Colquhoun and Partners ("BCP"), to provide quantity surveyors on secondment for the Kuwait Waterfront Project being undertaken by the Municipality of Kuwait. At the time of the invasion and occupation of Kuwait, Corderoy had provided one quantity surveyor for the project, a Mr Derek E. Pankhurst ("Mr Pankhurst").

351. Applying the approach taken with respect to loss of profits on a particular project set out in paragraphs 87 to 92, the Panel recommends no compensation.

B. Loss of tangible property

352. Corderoy seeks compensation in the amount of £8,063 for loss of tangible property.

353. Corderoy asserts that at the time of Iraq's invasion of Kuwait it had house/office furniture in storage in Kuwait at the premises of Messrs Al Ghanim Freight Air in the Industrial Area, and the furniture has not been recovered. It had put the office and domestic furniture into storage because its staff in Kuwait had been reduced to one, namely Mr Pankhurst, and the furniture was no longer required. When Corderoy returned to Kuwait after the cessation of hostilities it went to the premises of Al Ghanim Freight Air and discovered that its furniture and equipment was not there. It asserts that it was stolen or destroyed during Iraq's invasion and occupation of Kuwait.

354. The Panel finds that Corderoy has not provided sufficient evidence that it owned the property, that it was in Kuwait at the time of the invasion, or that its loss was caused by Iraq's invasion and occupation of Kuwait. The only evidence provided by Corderoy in support of the claim is an undated packing list.

355. The Panel recommends no compensation for loss of tangible property.

C. Payment or relief to others

356. Corderoy seeks compensation in the amount of £14,079 in respect of payment or relief to others.

357. Mr Pankhurst was Corderoy's only employee in Kuwait at the time of the unlawful invasion and occupation by Iraq. Corderoy asserts that Mr Pankhurst went into hiding at the time of the invasion, and was flown back to the United Kingdom from Baghdad on 11 December 1990. On 20 February 1991, after a period of re-settlement, Mr Pankhurst commenced work with the parent company of Corderoy in the United Kingdom.

358. Corderoy asserts that it continued to pay Mr Pankhurst his full salary up to December 1990 and a reduced salary thereafter until the time he recommenced work, thereby suffering a loss of £14,079.

359. In support of its claim for Mr Pankhurst's salary, Corderoy submitted a payroll record for April 1990 to March 1991 in respect of Mr Pankhurst; an overtime return in respect of Mr Pankhurst for the month of February 1991; and income tax returns for Mr Pankhurst for 1990, 1991 and 1992.

360. The salary allegedly paid by Corderoy to Mr Pankhurst is prima facie compensable as salary paid for unproductive labour. However, Corderoy has submitted no evidence that Mr Pankhurst was actually in Kuwait at the time alleged. It has not provided, for example, an affidavit of Mr Pankhurst describing the circumstances of his hiding and evacuation; a copy of his airline ticket from Baghdad to the UK; or a copy of his passport showing departure and arrival dates. Accordingly, Corderoy has not proved that its asserted loss is the direct result of Iraq's invasion and occupation of Kuwait.

361. The Panel recommends no compensation for payment or relief to others.

D. Financial Losses

362. Corderoy seeks compensation in the amount of £17,226 for expenses incurred on three visits made to Kuwait between June 1991 and October 1991 by one of its directors, a Mr R Ian Mackay.

363. Corderoy asserts that the visits were made in order to "re-establish lines of communication with our client, locate missing files, equipment and personal effects and to safeguard the company's future in Kuwait". The claim is made up of airfares, expenses and a time charge for Mr Mackay of £540 per day.

364. The Panel finds that Corderoy has not provided sufficient evidence to prove that the losses incurred in respect of the three visits to Kuwait

between June 1991 and October 1991 were a direct result of Iraq's invasion and occupation of Kuwait. The evidence suggest that the trips were undertaken to investigate business opportunities in Kuwait subsequent to the invasion.

365. The Panel recommends no compensation for financial losses.

E. Claim preparation costs

366. Corderoy seeks compensation in the amount of £2,030 for claim preparation costs. Applying the approach taken with respect to claim preparation costs set out in paragraph 40, the Panel makes no recommendation for claim preparation costs.

F. Summary of recommended compensation for Corderoy

367. Based on its findings regarding Corderoy's claim, the Panel recommends no compensation.

XV. THE CLAIM OF COSTAIN INTERNATIONAL LIMITED

368. Costain International Limited ("Costain") is a limited liability company registered in the United Kingdom. It had a contract in Kuwait with the Kuwait Real Estate Company ("KRE") to carry out site investigation works for the "Feasibility Study of Waterside Residential and Leisure Developments at Shuwaikh Site, Pearls of Kuwait Project" ("the Pearls of Kuwait contract"). Costain asserts that the entire contract amount had been paid in full by 2 January 1992. It seeks compensation in the amount of US$422,786 for loss of profits and loss of tangible property.

A. Loss of profits

369. Costain seeks compensation in the amount of £160,100 for loss of profits.

370. Costain asserts that the loss of its tangible assets (see heading B below), meant that it also lost the income it would have made from using these tangible assets. It claims lost profits for the period 2 August 1990, the date the assets were lost, to 31 July 1992, the date "at which it was established that the assets were not likely to be recovered and replacement items were procured".

371. Costain bases its calculation of lost profit on the turnover of its operating company, Foundation Engineering Limited ("FEL"), which performed the Pearls of Kuwait contract. It makes a "reasoned assessment" that 1/6 of Costain's plant and equipment holding was lost, so therefore 1/6th of the reduction in FEL's turnover for the period 2 August 1990 to July 1992 was caused by loss of the assets. It asserts that its profit amounts to 30 per cent on turnover (including approx. 19 per cent office overheads) and therefore loss of profits for 2 August 1990 to July 1992 amounts to £160,100.

372. The only evidence provided by Costain is in respect of the business operations of FEL in 1988-1990. Applying the approach taken with respect to loss of profits for future projects set out in paragraphs 93 to 95, the Panel recommends no compensation.

B. Loss of tangible property

1. Facts and contentions

373. Costain seeks compensation in the amount of £62,286 for loss of tangible property.

374. Costain asserts that on 2 August 1990 the assets used on the Pearls of Kuwait contract were in two 20 ft. containers standing in Shuwaikh Port awaiting shipment from Kuwait to Dubai. It has not been able to locate the containers or the items in them since this date and assumes that they were

appropriated by Iraqi forces and taken to Iraq. Costain asserts that there were 104 items in the two containers, including a hovercraft, drills, wrenches, and sockets. It seeks compensation for these assets in the amount of £47,582.

375. Costain also seeks compensation in the amount of £4,758 for the cost of shipping and insurance for the replacement equipment purchased after July 1992; and compensation in the amount of £9,945, being 19 per cent of the total claim for lost assets, for "head office overheads on tangible property".

2. Analysis and valuation

(a) Pearls of Kuwait assets

376. The Panel finds that Costain has provided sufficient evidence to substantiate its claim for loss of the Pearls of Kuwait assets. It has provided purchase invoices in respect of the property claimed, and evidence that the property was transported to Kuwait in about March 1990 for the Pearls of Kuwait contract. In relation to loss of the property, it has correspondence which shows that it was attempting to ship the goods from Kuwait to Dubai during the period of May to July 1990. It also has financial records dated 7 January 1991 entitled "Dubai listing of assets as at 31/12/90", which appear not to include the assets which it was attempting to ship from Kuwait.

377. The Panel finds that the value of Costain's loss is £14,224. The Panel recommends compensation in the amount of £14,224 (US$27,042).

(b) Shipping and insurance costs for replacement equipment

378. Costain has submitted no evidence in support of this loss element. The Panel recommends no compensation for shipping and insurance costs for replacement equipment.

(c) Head office overheads on tangible property

379. The only evidence provided by Costain in relation to this loss element is a letter from Costain's accountants stating that overheads for the year ended 31 December 1990 amounted to 19.58 per cent of turnover. Applying the approach taken with respect to head office and branch office expenses set out in paragraphs 82 to 86, the Panel recommends no compensation.

3. Recommendation for loss of tangible property

380. The Panel recommends compensation in the amount of £14,224 (US$27,042) for loss of tangible property.

C. Summary of recommended compensation for Costain

381. Based on its findings regarding Costain's claim, the Panel recommends compensation in the amount of US$27,042. The Panel finds the date of loss to be 2 August 1990.

XVI. THE CLAIM OF EWBANK PREECE LIMITED

382. Ewbank Preece Limited ("Ewbank") is a limited liability company registered in the United Kingdom. It is the main operating company of the Ewbank Preece Consulting Group which provides services worldwide in the field of consulting engineering. It entered into a contract with Gulf Cables and Electrical Industries Company ("Gulf Cable") on 13 September 1988 to act as consultant during the establishment of a new telecommunications cable factory in Kuwait.

383. At the time of Iraq's invasion and occupation of Kuwait on 2 August 1990, Ewbank asserts that it had not been paid for work in progress amounting to £64,280. It seeks compensation in the amount of US$122,205 for contract losses.

A. Contract losses

1. Facts and contentions

384. The total value of the contract between Ewbank and Gulf Cable for the provision of consulting services for the new telecommunications cable factory was £200,000, to be paid in seven lump sum instalments, upon completion of various stages of the contract.

385. As at 3 July 1990, Gulf Cable had paid Ewbank three of the instalments, totalling £80,000. Ewbank asserts that in August 1990 "the project was halted due to the Gulf incident". At this time it asserts that it had completed work on the contract for which it had not been paid to the value of £64,280. The work performed was in respect of "instalment e" and "instalment f" under the terms of the contract, ie:

> "e. Payment of 25 per cent of total lump sum value of contract on completion of installation of all machines.
>
> f. Payment of 20 per cent of total lump sum value of contract on completion of successful acceptance test of all machines."

386. Ewbank sought payment of the £64,280 from Gulf Cable in a letter dated 30 September 1991. Ewbank acknowledged that no amounts were payable pursuant to the terms of the contract, but asserted that the circumstances justified payment for the work done. Gulf Cable refused payment, stating in a fax dated 4 November 1991 that the "balance payments could become due only after completion of installation of machines...which unfortunately could not take place".

387. Ewbank states that completion of the next stages of the project could not take place because "invading army personnel decommissioned and confiscated" the plant being installed in the factory in 1990 as well as the majority of the plant previously commissioned in the "1978 project".

2. Analysis and valuation

388. The Panel finds that Ewbank has submitted sufficient evidence to show that it entered the contract with Gulf Cable and has been paid instalments a, b, c, and d under the contract, totalling £95,000. Ewbank submitted a copy of the contract with Gulf Cable, the Bid Assessment Report for April 1989, the Monthly Reports for March and April 1990, and the relevant invoices.

389. In support of the alleged work in progress for instalments e and f of the contract, which Ewbank has valued at £64,280, Ewbank has submitted a project programme, a man-hours analysis, and an expenses analysis.

390. The Panel determines that Gulf Cable has not paid Ewbank the £64,280. The correspondence from Gulf Cable is unequivocal in this regard.

391. The Panel finds that Ewbank's losses in relation to the work in progress for instalments e and f of the contract were directly caused by Iraq's invasion and occupation of Kuwait. The reason Ewbank was prevented from completing the installation of the machines, and prevented from performing the successful acceptance test, which would have entitled it to payment of instalments e and f under the terms of the contract, was the theft of the machines from the factory by the invading Iraqi forces. The value of Ewbank's loss would not have been the full amount of instalments e and f. On the basis of the evidence before it, the Panel assesses Ewbank's actual loss at £50,000.

3. Recommendation for contract losses

392. The Panel recommends compensation in the amount of £50,000 (US$95,057) for contract losses.

B. Summary of recommended compensation for Ewbank

393. Based on its findings regarding Ewbank's claim, the Panel recommends compensation in the amount of US$95,057. The Panel finds the date of loss to be 2 August 1990.

XVII. THE CLAIM OF IMI YORKSHIRE COPPER TUBE (EXPORTS) LIMITED

394. IMI Yorkshire Copper Tube (Exports) Limited ("IMI") is a limited liability company registered in the United Kingdom. IMI had a contract to supply Al Basel Building and Contracting Company ("Al Basel") of Kuwait with 45 bundles of copper tube for a purchase price of £54,928. IMI asserts that the copper tube was shipped to Kuwait and during the invasion of Kuwait by Iraq a portion of the copper tube, valued at £44,928, was stolen.

395. IMI seeks compensation in the amount of US$85,415 for loss of the copper tube.

A. Loss of tangible property

396. IMI asserts that the container holding the copper tube was placed aboard the vessel for shipping to Kuwait on 19 May 1990, arrived in Kuwait on 11 June 1990, was delivered to the customer on 29 July 1990, and was "retained [sic] empty" on 30 July 1990. It asserts that after the copper tube was "delivered" to the customer on 29 July 1990, during Iraq's invasion and occupation of Kuwait, some of the copper tube was stolen. IMI calculates the value of the stolen copper tube as the invoice value of the copper, ie, £54,928, less £10,000 which it was subsequently paid (some time after October 1992) by Al Basel for the copper tube that was not stolen.

397. The Panel finds that IMI has provided sufficient evidence to prove that it entered into a contract with Al Basel to supply 45 bundles of copper tube, and that the copper was delivered to Kuwait on 29 July 1990.

398. The Panel finds that IMI was not in Kuwait at the time of the invasion to protect the property, and that some of the property was subsequently stolen. The Panel recommends compensation in the amount of £44,928 for the loss of the copper tube.

399. The Panel notes that an examination of UNCC Claim No. 4005218 filed by Al Basel has revealed that Al Basel does not seek compensation for the loss of the copper tube for which it is recommended that IMI be compensated.

400. The Panel recommends compensation in the amount of £44,928 (US$85,415) for loss of tangible property.

B. Summary of recommended compensation for IMI

401. Based on its findings regarding IMI's claim, the Panel recommends compensation in the amount of US$85,415. The Panel finds the date of loss to be 2 August 1990.

XVIII. THE CLAIM OF KASKADE DRAINS LIMITED

402. Kaskade Drains Limited ("Kaskade") is a limited liability company registered in the United Kingdom which markets and distributes a drainage system. In October 1989 it agreed to supply drainage channels and fitments to Tariq Alghanim Limited of Kuwait ("Tariq") for a net value of £14,233. The materials were shipped to Kuwait on 19 May 1990 and arrived in Kuwait mid-June. Kaskade asserts that Tariq was due to collect the materials from the Kuwait harbour area on 2 August but "following the invasion of Kuwait...was never able" to do so. Kaskade asserts that Tariq has not paid the purchase price. It seeks compensation in the amount of US$27,459 for loss of tangible property and financial losses.

A. Loss of tangible property

403. In its claim form, Kaskade had characterised this loss element as a contract loss, but the Panel finds that it is more accurately described as a loss of tangible property.

404. The contract between Kaskade and Tariq specified a "C&F lump sum price" of £14,233. Tariq issued an irrevocable letter of credit for the benefit of Kaskade in this amount on 8 March 1990.

405. The Panel finds that Kaskade has provided sufficient evidence to prove that it entered into a contract with Tariq for the supply of drainage materials, and that these materials were shipped to Kuwait in May 1990.

406. The Panel finds that Kaskade was not in Kuwait at the time of the invasion to protect the property, and that the property was subsequently stolen. The Panel recommends compensation in the amount of £14,233 for the loss of the drainage materials.

407. The Panel notes that an examination of UNCC Claim No. 4003703 filed by Tariq has revealed that Tariq seeks compensation for the loss of tangible property, including 34 items of landscaping division stock. None of the 34 items appear to be drainage materials supplied by Kaskade. When Tariq's claim is processed by the Commission, Tariq should be requested to confirm that its claim for loss of stock does not include a claim in respect of the drainage materials for which, on the facts asserted by Kaskade and accepted by this Panel, Tariq has not paid.

408. The Panel recommends compensation in the amount of £14,233 (US$27,059) for loss of tangible property.

B. Financial losses

409. Kaskade seeks compensation in respect of £210 charged by the National Westminster Bank when it returned to Kaskade the documents relating to the unpaid irrevocable letter of credit.

410. The only evidence submitted by Kaskade in support of this loss element is a letter dated 12 May 1992 from the National Westminster Bank to Kaskade returning the unpaid documents in relation to the letter of credit, and charging the fee of £210. There is no evidence that Kaskade paid the fee.

411. The Panel recommends no compensation for financial losses.

C. Summary of recommended compensation for Kaskade

412. Based on its findings regarding Kaskade's claim, the Panel recommends compensation in the amount of US$27,059. The Panel finds the date of loss to be 2 August 1990.

XIX. THE CLAIM OF PIRELLI GENERAL PLC

413. Pirelli General PLC ("Pirelli") is a public limited company registered in the United Kingdom. Pirelli asserts that during Iraq's invasion of Kuwait much of its property was destroyed. It seeks compensation in the amount of US$5,503,338 for loss of profits, loss of tangible property, payment or relief to others, and financial losses.

A. Loss of profits

414. Pirelli seeks compensation in the amount of £1,325,000 for loss of profits in the years 1990-1993. The claim is based on the difference between the actual profit made in these years, and the profit which Pirelli expected for these years prior to Iraq's invasion and occupation of Kuwait. Pirelli asserts that it expected a profit of 5.4 per cent of income based on the fact that this was the net profit percentage in the pre-invasion years 1988-1990.

415. Applying the approach taken with respect to loss of profits for future projects set out in paragraphs 93 to 95, the Panel recommends no compensation.

B. Loss of tangible property

416. Pirelli seeks compensation in the amount of £260,340 for the loss of: (a) machinery, plant and equipment (£156,833); (b) vehicles (£71,985); and (c) fixtures and fittings (£31,522).

417. Pirelli asserts that it lost the property at three sites: its offices at Salwa, its main stores at Mina Abdulla, and at the apartments of its employees, all of which were destroyed or looted during the invasion.

418. The Panel finds that Pirelli has not provided sufficient evidence to substantiate its claim. It has provided a schedule of the tangible property listing the fixed asset number, purchase date, original cost, expected life, age at 1/8/90, and replacement value of each item of property. It has also provided some photographs of some unidentified equipment taken prior to the invasion, and one of its marketing brochures showing pictures of its equipment. However, it has provided no proof of ownership, and no proof that the property was in Kuwait at the time of the invasion. Nor has it provided any documentary records.

419. In relation to loss or destruction of the property, Pirelli has submitted two photographs; one showing damage to its stores at Mina Abdulla and the other showing damage to the area manager's office.

420. The Panel notes Pirelli's explanation for the lack of evidence that "the Kuwait Authorities have always required original documents in support of all costs in relation to our Kuwait branch operations to be retained in

territory" and therefore most of the documentation was lost or destroyed during the occupation. However, this does not explain the lack of copy documents or other records which would have filled the gaps in the probative chain.

421. The Panel recommends no compensation for loss of tangible property.

C. Payment or relief to others

422. Pirelli seeks compensation in the amount of £113,416 for "termination costs" paid to nine of its employees.

423. Pirelli does not explain the nature of the "termination costs". The claim documentation provided by Pirelli refers variously to "indemnities", "severance pay", "notice entitlement", part of an air fare, salary in lieu of leave not taken in 1990, and "termination payments".

424. The Panel finds that Pirelli has not provided sufficient evidence to substantiate its claim for termination costs. It has provided evidence of the identity of only three of the employees, in the form of photocopies of their passports.

425. In proof of payment, in respect of five of the employees, Pirelli has provided letters, internal memorandums or file notes produced by itself which either make arrangements for payments to be made, or refer to payments having been made.

426. It has submitted some independent evidence that payments of some description were made. There are two letters from one of the employees (Mohammed Pervaiz Akhtar) thanking Pirelli for certain payments, although the letters do not specify the nature of the payment nor the amount. There is a letter from another of the employees (Shahid Maqbool) asking Pirelli for payment of "indemnities" and stating that he had spoken to three other employees (Arif Butt, Aslam Saeed & Ishtiaq) "who all confirm that their indemnities have already been settled". Two letters from another employee advise Pirelli that the employee had been sent the wrong amount for his termination payment.

427. The Panel finds that Pirelli has not provided sufficient explanation of its claim to enable the Panel to determine whether the termination costs were directly caused by Iraq's invasion and occupation of Kuwait, or to enable the Panel to match the amounts claimed with the amounts stated in the documentation submitted by Pirelli.

428. The Panel recommends no compensation for payment or relief to others.

D. Financial losses

429. Pirelli seeks compensation in the amount of £1,196,000 for interest incurred on certain term loans and overdraft facilities which it had with the National Bank of Kuwait. It states that it paid interest totalling £1,196,000 in respect of these loans and facilities for the period August 1990 to December 1993. Its only explanation of the claim is that the interest was "incurred as a direct result of the delays in securing payments from the MEW for contracts which were in the process at the time of the invasion".

430. The Panel finds that Pirelli has not provided sufficient evidence to substantiate its claim. It has not, for example, provided evidence that it actually had contracts in existence with "MEW".

431. The Panel finds that the interest losses asserted by Pirelli were not directly caused by Iraq's invasion and occupation of Kuwait, but by the economic decision of Pirelli not to repay the principal on the loans and overdraft facilities.

432. The Panel recommends no compensation for financial losses.

E. Summary of recommended compensation for Pirelli

433. Based on its findings regarding Pirelli's claim, the Panel recommends no compensation.

XX. THE CLAIM OF LEWIS & ZIMMERMAN ASSOCIATES, INC.

434. Lewis & Zimmerman Associates, Inc ("Lewis") is a legal entity with limited liability incorporated in the State of Maryland, United States of America. Lewis is a firm of professional engineers, architects, and certified value specialists. It entered into a contract with KEO Architects Engineers Planners ("KEO") to provide consulting value engineering services in relation to two design projects which KEO was undertaking for the Kuwaiti Ministry of Public Works. Lewis invoiced KEO for a total amount of US$74,456. KEO has paid US$35,570. Lewis seeks compensation in the amount of US$38,886 for the outstanding amount.

A. Contract losses

1. Facts and contentions

435. The contract between Lewis and KEO was entered into on 4 May 1990. The total lump sum price for Lewis's services was US$60,741 to be paid in two instalments: (i) 90 per cent on submission of the Value Engineering Study Reports to various specified bodies; and (ii) 10 per cent on approval of the reports by the Kuwaiti Ministry of Public Works. In addition, Lewis was to invoice KEO for the travel expenses to and from Kuwait for four of its engineers.

436. The value engineering studies comprised three phases: (i) preparation phase; (ii) workshop phase; and (iii) post-workshop phase. The workshop phases of the two studies were completed in Kuwait over 19-22 May 1990 in respect of the "S22" project, and 20-29 May 1990 in respect of the "S23" project. The Value Engineering Study Reports were submitted to the Kuwaiti Ministry of Public Works on 18 June 1990. Lewis asserts that it was engaged in the post-workshop phase at the time of the invasion.

437. Lewis invoiced KEO on 15 May 1990 for US$13,716 for air travel expenses to Kuwait; and on 12 June 1990 for US$60,740 for the 90 per cent of the contract value due upon submission of the reports.

438. Lewis pursued payment of its invoices from September 1990 to May 1994. It corresponded with KEO, the Kuwaiti Ministry of Public Works, the Kuwaiti Embassy in Washington and the U.S. Department of Commerce. In May 1994 it reached an agreement with KEO by which KEO agreed to pay the "direct labor and other direct costs" incurred by Lewis on the contract. These costs amounted to US$35,570, the amount by which Lewis subsequently reduced its claim.

2. Analysis and valuation

439. The Panel finds that Lewis has provided sufficient evidence to prove that it entered the contract with KEO and completed it. The payment provisions make it clear that the monies claimed by Lewis were largely due

on the submission of the reports and the balance within a limited time thereafter.

440. However, the Panel finds that Lewis's contract loss was not directly caused by Iraq's invasion and occupation of Kuwait. It was caused essentially by the refusal of KFO to honour its clear contractual obligations. KEO made an economic decision as to the use of its available resources. That use did not include full payment to Lewis. Lewis effectively accepted this decision when it compromised its claim.

3. Recommendation for contract losses

441. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Lewis

442. Based on its findings regarding Lewis's claim, the Panel recommends no compensation.

XXI. SUMMARY OF RECOMMENDED COMPENSATION

443. Based on the foregoing, the Panel recommends the following amounts of compensation for direct losses suffered by the claimants as a result of Iraq's invasion and occupation of Kuwait:

(a) Lescomplekt Ltd (Bulgaria): US$14,260;

(b) Telecomplect AD (Bulgaria): US$265,180;

(c) China Civil Engineering Construction Corporation (China): US$279,782;

(d) China Harbour Engineering Company (China): US$1,146,669;

(e) The General Company for Land Reclamation (Egypt): nil;

(f) CIPEC (France): nil;

(g) Freyssinet International et Compagnie (France): nil;

(h) Chemitherm Plants and Systems Pvt Ltd (India): nil;

(i) Murazumi Construction Co. Ltd (Japan): US$464,744;

(j) Corderoy International Limited (United Kingdom): nil;

(k) Costain International Limited (United Kingdom): US$27,042;

(l) [illegible]ank Preece Limited (United Kingdom): US$95,057;

(m) [illegible] Yorkshire Copper Tube (Exports) Limited (United Kingdom): US$85,415;

(n) Kaskade Drains Limited (United Kingdom): US$27,059;

(o) Pirelli General PLC (United Kingdom): nil; and

(p) Lewis & Zimmerman Associates, Inc,(United States of America): nil.

Table 4: Table of recommended compensation

Claimant	Claim amount	Recommended compensation
Lescomplekt Ltd	US$1,042,868	US$14,260
Telecomplect AD	US$825,394	US$265,180
China Civil Engineering Construction Corporation	US$9,224,548	US$279,782
China Harbour Engineering Company	US$2,623,588	US$1,146,669
The General Company for Land Reclamation	US$14,778,645	nil
CIPEC	US$79,359	nil
Freyssinet International et Compagnie	US$3,334,131	nil
Chemitherm Plants and Systems Pvt Ltd	US$250,502	nil
Murazumi Construction Co. Ltd	US$1,599,843	US$464,744
Corderoy International Limited	US$95,852	nil
Costain International Limited	US$422,786	US$27,042
Ewbank Preece Limited	US$122,205	US$95,057
IMI Yorkshire Copper Tube (Exports) Limited	US$85,415	US$85,415
Kaskade Drains Limited	US$27,459	US$27,059
Pirelli General PLC	US$5,503,338	nil
Lewis & Zimmerman Associates, Inc	US$38,886	nil

Geneva, 25 June 1999

(Signed) Mr. John Tackaberry
Chairman

(Signed) Mr. Pierre Genton
Commissioner

(Signed) Vinayak Pradhan
Commissioner